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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. If a Federal District Court finds that an attorney has been guilty of misconduct in a case pending before it, may it disqualify the attorney from further participation in the case?

2. In such a case, are the District Court's findings of fact protected by the clearly erroneous rule, and is its determination subject to reversal only for abuse of discretion?

3. May an attorney be disqualified for eve of jury selection dissemination to the most widely circulated local newspaper of material previously ruled inadmissible and prejudicial (a) with intent to circumvent the orders of the District Court; (b) with intent to prejudice the defendant's case; and (c) after similar conduct in a previous case?

4. Is an order disqualifying counsel in a civil case subject to interlocutory appeal in light of *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)?*

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* The caption of the case in this Court contains the names of all parties to the proceedings in the court below. Petitioner (now known as Merrell Dow Pharmaceuticals Inc.) is a subsidiary of The Dow Chemical Company. The following subsidiaries and affiliates of The Dow Chemical Company have outstanding securities in the hands of the public: Dow Banking Corporation; Dow Chemical Iberica S.A.; Gruppo Lepetit S.p.A.; Ivon Watkins-Dow Limited; Laboratorios Industriales Farmaceuticos Ecuatorianos; Merrell Toraude et Compagnie; Oronzio De Nora Impianti Elettrochimici S.A.; and Pacific Chemicals Berhad.

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richardson-Merrell Inc., the defendant below, respectfully prays that a writ of certiorari issue to review the decision rendered by the United States Court of Appeals for the District of Columbia Circuit (Circuit Judges Wald and Mikva, with District Judge Richey concurring in a separate opinion), which reversed an order of the United States District Court for the District of Columbia (Honorable Norma Holloway Johnson, U.S.D.J.) disqualifying respondents James G. Butler and Nicholas R. Allis as two of the trial counsel for plaintiffs in this action.

Opinions Below

The opinions delivered in the Court of Appeals are not yet reported, and are set forth in the Appendix (1a-71a). The Memorandum Opinion of the District Court is not yet reported, and is set forth in the Appendix (72a-78a).

Jurisdiction

The judgment of the Court of Appeals was dated and entered May 29, 1984 (81a). Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals on July 17, 1984 (82a-85a). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statute and Rules Involved

28 U.S.C. § 1291; Fed. R. Civ. P. 52(a); Rules 1-4, 4-3(IV), and 4-3(VIII) of the United States District Court for the District of Columbia; Disciplinary Rules 1-102(A), 2-110(B)(1), 5-105(D), 7-102, 7-106, 7-107(H)-(J), and 7-108(A)-(B), of the District of Columbia Code of Professional Responsibility; and Sections 632 and 633.5 of the California Penal Code are set forth verbatim in the Appendix (86a-99a).

Statement of the Case

This is a product liability case in which the plaintiffs claim that defendant's drug Bendectin caused the birth defects of the infant plaintiff, Anne Elisabeth Koller.*

* The plaintiffs in this action are now included among members of a class defined on June 18, 1984 by the United States District Court for the Southern District of Ohio in *In re Richardson-Merrell Inc. "Bendectin" Products Liability Litigation*, MDL No. 486. A proposed settlement of that class action has been filed with the court, but notice thereof has not yet been sent to class members. The plaintiffs in this action have not yet taken any position with respect to the proposed class action settlement.

Among the central issues in the case are whether Bendectin actually causes birth defects, and whether Mrs. Koller in fact took Bendectin during the first 40 days of pregnancy (JA602-JA614*).

The action was commenced on May 19, 1980 (JA2). The basis for federal jurisdiction was diversity of citizenship under 28 U.S.C. § 1332 (JA77). Plaintiffs were represented by eight attorneys (JA1, JA2, JA20, JA21, JA37, JA64). On January 6, 1984, before the case proceeded to trial, the District Court found after full hearings that two of plaintiffs' counsel, James G. Butler and Nicholas R. Allis, were guilty of misconduct in connection with the action, and held that they should be disqualified from further participation in the case (72a-80a).

A. The Facts Found by the District Court

The District Court's action was based upon its findings concerning distinct acts of misconduct by Butler and Allis.

1. *Butler: Knowing Release of Inadmissible Evidence to Prejudice Defendant's Case and Circumvent the Court's Rulings*

The District Court entered a number of pretrial orders designed to preclude the plaintiffs from placing irrelevant and prejudicial categories of evidence before the jury. On October 19, 1982, the District Court entered an order barring references to thalidomide and MER/29, drugs

* "JA" citations are to the Joint Appendix in the Court of Appeals, a copy of which will be lodged with this Court.

which are unrelated to Bendectin and have not been marketed for over 20 years (JA111). On January 17, 1983, the District Court entered an order precluding evidence relating to Marco Cordova and Pauline Sand, "children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne Koller" (JA133-JA134). On January 31, 1983, the District Court held that plaintiffs' use of Drug Experience Reports ("DERs") submitted to the Food and Drug Administration ("FDA") would be limited to no more than five DERs, chosen from those submitted within one year after the birth of the children involved (JA157-JA166).*

Beginning on January 28, 1983, Butler took steps which resulted in the circumvention of all three of these orders of the District Court. At this time, the final pretrial of the action was scheduled to begin on January 31, 1983, to be followed immediately by trial (JA593, JA595). Butler prepared simulated DERs concerning 14 limbless children, including Marco Cordova and Pauline Sand, all of whom were more than one year old (JA2850-JA3107). All 14 children were clients of Butler's firm (JA1516). Butler added photographs showing the deformities of each of the 14 children and sent the DERs and photographs to Morton Mintz of *The Washington Post*, as well as to the Commissioner of the FDA, the Surgeon General, and the defendant (JA270-JA274, JA1513-JA1515).

* The DERs are hearsay reports of birth defects in children of mothers who took Bendectin during pregnancy. The District Court recognized that the DERs are not a random sample and are not based upon any scientific methodology (JA165-JA166). In order to limit collateral issues, the Court restricted plaintiffs to a total of no more than five DERs (JA166). Because the danger of self-serving DERs increases with the time elapsed between birth and the filing of the DERs, the District Court precluded the use of DERs filed more than one year after birth (JA164).

Butler followed up this release by giving an interview to Morton Mintz of *The Washington Post* on February 1, 1983 (JA272-JA273). Predictably, Butler's efforts resulted in a six-column article on the third page of *The Washington Post* for February 7, 1983 (JA1516). The article highlighted Butler's charge that the 14 limbless children were victims of Bendectin, characterizing the 14 cases as a "new chapter" in a "controversy" concerning Bendectin (*ibid.*). It described in detail the deformities of Anne Koller and several other children (*ibid.*). The article referred specifically to the forthcoming trial of this case, stating that the trial "may begin this week in U.S. District Court here" (*ibid.*). It reported Butler's involvement with a prior thalidomide case against the defendant, and quoted Butler as saying that most of the 14 Bendectin cases had been referred to him by lawyers who knew of his prior thalidomide case (*ibid.*).

By using *The Washington Post* in this manner, Butler was able to place before prospective jurors all three of the irrelevant and prejudicial categories of evidence which the District Court had ruled inadmissible: (1) thalidomide; (2) Marco Cordova, Pauline Sand, and other "children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar to those of Anne Koller" (JA133-JA134); and (3) self-serving DERs prepared by counsel long after the one-year cutoff adopted by the District Court.

There was no release of the material given to *The Washington Post* to any other newspaper or correspondent (*see* JA272-JA273). This fact gave rise to a powerful inference

that Butler's purpose in sending the material to *The Washington Post* was to disseminate it to prospective jurors in this case, thereby circumventing the evidentiary rulings of the District Court. The District Court twice invited Butler to give his explanation of the timing and narrow scope of his release (JA618, JA1062-JA1062-1), but Butler declined to testify. On February 17, 1983, ten days after the publication, Butler's counsel admitted to the District Court that he could not explain the timing of Butler's release (JA615-27). On May 24, 1983, three and one half months after the publication, Butler filed an affidavit in which he attributed the timing to the need to obtain permission for the release from the families of the 14 children (JA273), an explanation which was undercut by the fact that all 14 families were clients of Butler's law firm who had been referred "[o]ver the last two years" (JA1516).

Moreover, it developed that this was not the first instance in which Butler had used the press to communicate inadmissible evidence to the jury. There was undisputed evidence that Butler had used the press to place inadmissible evidence before the jury in a previous drug product liability case in 1975, near the end of two and one half months of trial. *Johnson* v. *SmithKline Corp.*, Ariz. Super. Ct., Maricopa County, Cause No. 266659 (JA430-JA435).

On the basis of all of the facts before it, the District Court found that "Butler's knowing release to the Post of information previously ruled inadmissible by this Court was a flagrant circumvention of the orders of this Court" (77a). The District Court further found that Butler's refusal to testify as to his motives supported its "conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings" (78a).

2. *Allis: Attempt to Thwart a True Investigation of a Crucial Witness in This Case*

Nicholas R. Allis is Butler's partner in the law firm of Butler, Jefferson, Dan & Allis of Los Angeles, California. The District Court's finding of misconduct by Allis arose from the following sequence of events.

On Wednesday, December 22, 1982, Krystyna Janowski, Allis's secretary, telephoned the offices of one of defendant's counsel and left two telephone messages stating, among other things, that this case was fraudulent and that Mrs. Koller was lying as to the time when she took Bendectin (JA334, JA336, JA4530-JA4542). Defense counsel attempted to arrange for a conference with the District Court, but were told by the District Court's law clerk that the Court was in recess until the following Monday, December 27, 1982 (JA596-44-JA596-46, JA1461). Defendant's counsel obtained independent counsel to represent and advise Ms. Janowski (JA564, JA1461). By a letter delivered by hand on Monday, December 27, 1982, defense counsel advised the District Court of these developments (JA1461-JA1462).

Meanwhile, Ms. Janowski had second thoughts about the damage that might result to the Butler firm (JA4555-JA4556). On Sunday night, December 26, 1982, she contacted the Butler firm and told it that she had been induced and pressured to contact defense counsel (JA4556-JA 4559).* The Butler firm lost no time in reacting. On Monday evening, December 27, 1982, Allis obtained Ms. Janowski's signature under oath on a statement which

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* In subsequent testimony under oath, Ms. Janowski and defendant's representatives who dealt with her all denied any pressure or inducement (JA1065, JA1102-JA1103, JA1378-JA1382, JA1388-JA1389, JA4542).

Allis himself had drafted, retracting her disclosures to defense counsel (JA1504). The text of the statement is set forth in the opinion of the Court of Appeals (9a-10a). The next day, Tuesday, December 28, 1982, Butler transmitted this statement to the District Court (JA1501-JA1505).

On January 3, 1983, Ms. Janowski's counsel wrote to the District Court, stating that Ms. Janowski disavowed the statement and averring that the statement was obtained under duress and on an offer by the Butler firm to continue payment of Ms. Janowski's full salary and fringe benefits, including hospitalization benefits for her premature baby (JA1511-JA1512). Beginning on January 12, 1983, Ms. Janowski's deposition was taken in Los Angeles. She testified that Mrs. Koller had admitted to her that she did not take Bendectin as early as she had testified (JA4444-JA4447, JA4465-JA4468). Ms. Janowski further testified that Allis told her on December 27, 1982 that she could undo the damage she had done if she would sign a statement retracting what she had said (JA4575-JA4576, JA4698-JA4699). She stated that Allis agreed that she would be continued as an employee of the Butler firm without working in the office (JA1119, JA4584-JA4585). Ms. Janowski also testified that Allis told her that if she did not cooperate, the Butler firm would destroy her with her own past (JA1130-JA1131).*

After reading the transcript of Ms. Janowski's deposition, the District Court authorized depositions of representatives of both plaintiffs and defendant on the issues raised in connection with the Janowski deposition (JA574-JA593, JA 600-1, JA625-JA628). After reviewing the depositions, the District Court ruled that an evidentiary hearing should be held with respect to the statement prepared by Allis (JA630-JA631). The District Court made clear that it was concerned in this hearing, not with whether or not Ms. Janowski talked to Mrs. Koller, but with the conduct of Allis and the Butler firm in preparing the statement signed by Ms. Janowski and presenting it to the Court (*see* JA623-JA624, JA644-JA646).

* Ms. Janowski was in fact subjected at her deposition to brutal and prolonged cross-examination concerning aspects of her past life. This cross-examination did not succeed in shaking the testimony which Ms. Janowski gave on direct examination (*see* JA1117-JA1132, JA1522-JA1531).

At the evidentiary hearing, plaintiffs presented no testimony, but defendant called Allis and other witnesses identified with the plaintiffs. After the evidentiary hearing, the District Court issued an order to show cause why Allis should not be disqualified (JA207-JA208). In response to the order to show cause, Allis testified again, together with character witnesses and two expert witnesses on legal ethics.

Butler and Allis claimed that they did not learn until Tuesday, December 28, 1982 that Ms. Janowski had told defense counsel that the case was fraudulent, so that the statement obtained by Allis on December 27, 1982 was not designed as a retraction, but merely represented an effort to ascertain the facts on behalf of their clients (JA3920-JA3921, JA3947, JA3988, JA4090, JA4093, JA4360). This testimony of Butler and Allis was contradicted, however, by their client, Mrs. Koller, their co-counsel, Allen T. Eaton, and their investigator, Floyd T. Humphries, Jr., all of whom testified that Butler or Allis had told them on December 27, 1982, before the statement was obtained, that Ms. Janowski had told defense counsel that the case was fraudulent (JA3583-JA3584, JA3764, JA3783-JA 3784). The District Court resolved this conflict in testimony adversely to the claim of Butler and Allis, finding that

> "the credible and probative evidence in the record reveals that the primary, if not the only reason, Allis and Humphries visited Janowski on December 27, 1983, was to obtain a retraction." (76a.)

On the basis of all the testimony it had heard, the District Court further found that Allis's conduct in procuring the retraction and presenting it to the Court without explanation was improper (76a). Indeed, the uncontradicted evidence before the Court made clear that the statement as presented to the Court was seriously misleading. For example, the statement recited that Ms. Janowski had been promised no remuneration for the statement "or for anything else" (JA1504), but in fact Allis agreed that she could continue to receive her salary without coming into the office and proposed having a typewriter sent to her apartment (JA712, JA849-JA851, JA3808, JA3827-JA3828). Again, the statement twice recited that Ms. Janowski's mind was "free and clear" (JA1504), whereas in fact Butler believed that Ms. Janowski had "flipped" or was "crazy" (JA3856), while Allis believed that she was "a little bit emotionally unstable" (JA684), "hostile" (JA813), and "an emotionally somewhat unbalanced woman" (JA3671).

The District Court further found that Allis's purpose in obtaining the statement and submitting it to the Court was not "to ascertain the truth" but rather "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (77a). The District Court concluded that this finding was supported by a number of factors, including

> "1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his 'investigation'; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27." (76a-77a.)

On the basis of "the totality of the evidence," the District Court therefore rejected the opinions of the experts on legal ethics called by the plaintiffs, and held that Allis's conduct was improper (76a).

3. *The Appropriateness of Disqualification*

Having found that both Butler and Allis were guilty of misconduct, the District Court proceeded to consider the appropriate remedy.

The District Court specifically found that if the Butler firm was disqualified, "remaining counsel can provide plaintiffs with competent counsel" (78a). It observed that plaintiffs' other counsel included the attorneys that represented the plaintiffs in the first Bendectin case to reach trial (*ibid.*). *See Mekdeci* v. *Merrell National Laboratories,* 711 F.2d 1510, 1516-25 (11th Cir. 1983). For these reasons, the District Court found that "[p]laintiffs' case would not be jeopardized by the disqualification of the Butler firm" (*ibid.*).

The District Court also considered the effects of disqualification upon the Butler firm (75a, 78a). It concluded that these effects "do not outweigh the strong public interest in maintaining the integrity of the judicial process" (78a).

B. The Facts as Refound by the Court of Appeals

On appeal, the Court of Appeals (Circuit Judges Wald and Mikva, with District Judge Richey concurring in a

separate opinion) discarded or ignored the findings of fact made by the District Court, and substituted new and different findings of its own.

1. *Butler: "Some Question" as to Bad Intent*

With regard to Butler, the Court of Appeals stated that it had "some question" about the District Court's finding that Butler acted with intent to prejudice the defendant and to circumvent the District Court's evidentiary rulings (51a). The Court of Appeals termed "plausible" Butler's belated explanation that he had to wait until January 1983 for the parents' authorization to release the DERs (*ibid.*). It concluded that the support for the District Court's finding of bad intent was not "unambiguous" (*ibid.*). However, the Court of Appeals nowhere stated that the District Court's finding as to Butler's intent was erroneous, let alone clearly erroneous.

The Court of Appeals complained that the District Court had made no finding as to the impact of Butler's actions on the likelihood of a fair trial (55a). Instead of remanding for a finding on this issue, the Court of Appeals made a finding itself:

> "We have no basis for believing that voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article." (*Ibid.*; footnote omitted.)

Defendant's petition for rehearing pointed out that there should be a remand if this issue was deemed critical (pp. 7-8), but the Court of Appeals declined to remand the matter.

In its initial opinion, the Court of Appeals held that Butler did not violate Canon 20 of the District of Columbia

Code of Professional Responsibility (53a-56a). On July 16, 1984, the Court of Appeals amended its opinion to delete this holding, and replaced it with a statement that it had not determined whether or not Butler's conduct violated Canon 20 (70a-71a). By way of conclusion, the Court of Appeals stated that "[w]hile Butler's decision to release the DERs to the press precisely when he did is not to be applauded," it could not furnish a basis for disqualification (56a).

2. *Allis: "On the Whole," No Misconduct*

The District Court's central finding as to Allis was that he attempted "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (77a). Again, the Court of Appeals questioned this finding, but did not reverse it. The Court of Appeals acknowledged that "[t]here is authority for the proposition that surreptitiously recording generally is unethical," and it stated that "this court does not sanction the practice" (47a). However, the Court of Appeals said, under the circumstances of this case, "Allis' actions in taping his conversation with Janowski can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (*ibid.*).

The Court of Appeals similarly reviewed the other factors relied upon by the District Court, and indicated that it did not view them as the District Court had (43a-47a). The Court of Appeals concluded that "[o]n the whole, we conclude that Allis' actions throughout the Janowski episode did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs" (47a-48a; footnote omitted).

C. The Decision of the Court of Appeals

The Court of Appeals did not find any of the District Court's findings of fact to be clearly erroneous, although (as noted above) it freely engaged in *de novo* factfinding on appeal. Nor did it find that the District Court had abused its discretion. Instead, the Court of Appeals held that, as a matter of law, Butler and Allis could not be disqualified on the basis of their actions in this case:

> "We conclude that the district court applied an erroneous legal standard in evaluating whether Allis and Butler had engaged in misconduct warranting revocation of their *pro hac vice* appearances. Viewed under the appropriate standards, the conduct of neither Butler nor Allis justifies the court's order revoking their appearances and disqualifying their law firm. . . ." (56a).

Citing *Board of Education* v. *Nyquist*, 590 F.2d 1241 (2d Cir. 1979), the Court of Appeals held that disqualification should "rarely" be granted for misconduct not involving a past or present conflict of interest (37a-38a). The Court of Appeals said that "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel" (38a). As examples of such other means, the Court mentioned reprimands, contempt citations, and referrals to bar disciplinary bodies (38a n.49).

Reasons for Granting the Writ

1. The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct

Until the decision of the Court of Appeals in this case, it was established law in each of the Circuits that the District Courts have the authority and the responsibility to supervise the conduct of the attorneys appearing in cases before them.* It was further established that pursuant to this supervisory authority, the District Courts have the power to disqualify counsel who have been guilty of misconduct in cases pending before them from further participation in those cases.**

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* *See, e.g., Groper* v. *Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983); *Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Dunton* v. *County of Suffolk*, 729 F.2d 903, 909 (2d Cir. 1984); *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Kreda* v. *Rush*, 550 F.2d 888, 889 (3d Cir. 1977); *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *In re Asbestos Cases*, 514 F. Supp. 914, 919-20 (E.D. Va. 1981), *aff'd without opinion by an equally divided court sub nom. Greitzer & Locks* v. *Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Musicus* v. *Westinghouse Electric Corp.*, 621 F.2d 742, 744 (5th Cir. 1980); *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *City of Cleveland* v. *Cleveland Electric Illuminating Co.*, 440 F. Supp. 193, 195-96 (N.D. Ohio 1976), *aff'd without opinion*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976); *Gilbert* v. *City of Little Rock*, 622 F.2d 386-87 (8th Cir. 1980); *Trone* v. *Smith*, 621 F.2d 994, 999 (9th Cir. 1980); *Redd* v. *Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975); *Kesselhaut* v. *United States*, 555 F.2d 791, 794 (Ct. Cl. 1977).

** *See, e.g., United States* v. *Snyder*, 707 F.2d 139, 145 (5th Cir. 1983); *United States* v. *Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982); *United States* v. *Dinitz*, 538 F.2d 1214, 1219-23 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Laughlin* v. *Eicher*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945); *Viereck* v. *United States*, 130

The decision of the court below, by holding that disqualification is barred in this case as a matter of law, would deprive the District Courts of a remedy which has long been recognized as a vital part of the means available to them to deal with misconduct by counsel.* Such a curtailment of the remedies available to the District Courts would be especially unfortunate in view of the key role that they play in insuring the fairness and effectiveness of the administration of justice in the Federal courts. *See, e.g., Roadway Express, Inc.* v. *Piper,* 447 U.S. 752, 764-67 (1980); *Geders* v. *United States,* 425 U.S. 80, 86-87 (1976).

The court below suggested that alternative means such as reprimands, contempt citations, and bar disciplinary proceedings will suffice to deal with misconduct by counsel (38a & n.49). This suggestion ignores the lessons of history. In particular, it ignores the many serious practical difficulties standing in the way of effective professional discipline. *See, e.g.,* ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). The alternative remedies suggested by the court below did not deter either Butler or Allis in this case. If the decision below is allowed to stand, its proposed alternatives will be read as make-weights. It will have destroyed the most effective remedy.

F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds,* 318 U.S. 236 (1943); *United States* v. *Madsen,* 148 F. Supp. 625, 627-28, 632-33 (D. Alaska 1957).

* Apparently unwilling to admit that it was foreclosing altogether the possibility of disqualification for misconduct, the court below indicated that disqualification might possibly be granted for misconduct, albeit "rarely" and "in cases of truly egregious misconduct" (38a). However, the Court of Appeals did not describe any set of facts on which it would sustain disqualification for misconduct, and it made clear that disqualification would not be sustained here even if misconduct were found (*see, e.g.,* 50a-56a).

The court below cited *Board of Education* v. *Nyquist,* 590 F.2d 1241 (2d Cir. 1979), for the proposition that disqualification should be limited essentially to past and present conflicts of interest (37a-38a). The *Nyquist* case, however, held only that disqualification should not be granted on the basis of an appearance of impropriety arising from a conflict unless there is an actual past or present conflict. Neither *Nyquist* nor any other case known to us held that where there has been actual misconduct, disqualification may not be granted in the absence of a past or present conflict of interest. To the best of our knowledge, the decision below is the first to so hold. It should be reversed by this Court.

2. The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review

The Court of Appeals in this case totally ignored the restraints which should be observed by an appellate court. Without paying any heed to the clearly erroneous rule, the Court of Appeals freely made factual findings different from those made by the District Court. Without concerning itself with the abuse of discretion standard of review, the Court of Appeals imposed its own conception of the proper outcome in this case. If such actions by the Courts of Appeals are to be permitted, the supervisory authority of the District Courts over attorneys practicing before them will be gravely reduced.

a. *The Clearly Erroneous Rule*

Rule 52(a) of the Federal Rules of Civil Procedure mandates that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of

the witnesses." This Court has repeatedly stressed the fundamental importance of this limitation upon the scope of appellate review of facts. *See, e.g., Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 285-90 (1982); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948). The Court has consistently emphasized that where an appellate court deems further findings of fact to be necessary, it should remand to the trial court for such findings rather than making them itself. *See, e.g., Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982); *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-32 (1974). In addition, the Court has held that "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The Court of Appeals in this case flouted all of these precepts. Without holding any of the District Court's findings to be clearly erroneous, it indicated that it deemed other findings to be "plausible" or "more easily . . . understood" (*see* pp. 12, 13 *supra*). Instead of remanding, the Court of Appeals made its own findings in areas not covered by the District Court's findings (*see* pp. 12-13 *supra*). It disregarded the District Court's findings as to the intent of Butler and Allis, despite the fact that the District Court had the opportunity to appraise the demeanor of Butler, Allis, and their colleagues during extensive testimony (*see* pp. 12, 13 *supra*). In short, the Court of Appeals knew what result it wished to reach in this case, and rewrote the facts to match. If this is permitted, the clearly erroneous rule is a dead letter.

b. *The Abuse of Discretion Standard*

Until recent years, it was generally accepted that because the District Courts have the primary responsibility for supervising the attorneys practicing before them (*see* p. 15 *supra*), the standard of review on appeal of orders disqualifying attorneys should be abuse of discretion.* This is still the rule in a number of Circuits.** Other Circuits, however, have begun to hold in recent years that the standard of review of attorney disqualification orders should be the clearly erroneous rule as to findings of fact, together with review for legal error as to issues of law.*** There presently exists a clear conflict between the Circuits on this issue, which has been noted by various Courts of Appeals.****

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* *See, e.g., Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382, 1386 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *United States* v. *Clarkson*, 567 F.2d 270, 272 n.2 (4th Cir. 1977); *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976); *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

** *See, e.g., Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 131 (2d Cir. 1976); *Gilbert* v. *City of Little Rock*, 622 F.2d 386 (8th Cir. 1980); *Paul E. Iacono Structural Engineer, Inc.* v. *Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983); *Redd* v. *Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975).

*** *See, e.g., United States* v. *Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980); *Richmond Hilton Associates* v. *City of Richmond*, 690 F.2d 1086, 1088 (4th Cir. 1982); *United States* v. *Snyder*, 707 F.2d 139, 143-44 (5th Cir. 1983); *General Mill Supply Co.* v. *SCA Services, Inc.*, 697 F.2d 704, 711 (6th Cir. 1982); *Novo Terapeutisk Laboratorium A/S* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188-89 (7th Cir. 1979); *Norton* v. *Tallahassee Memorial Hospital*, 700 F.2d 617, 618-20 (11th Cir. 1983) (en banc).

**** *See, e.g., Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Novo Terapeutisk Laboratorium A/S* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188 (7th Cir. 1979).

In the present case the District of Columbia Circuit, which had previously applied a standard of abuse of discretion,* ranged itself with the Circuits that have adopted a more far-reaching mode of review, announcing that it would review for legal error (33a-34a & n.44). It then refound the facts in total violation of the clearly erroneous rule (*see* pp. 17-18 *supra*), and finally announced that on the basis of the facts it had found, it would be legal error to disqualify Butler and Allis (56a).

In its relentless drive for reversal, the Court of Appeals ignored the District Court's careful weighing of the factors bearing upon its exercise of discretion (*see* p. 11 *supra*). In particular, the Court of Appeals utterly ignored the express finding of the District Court that plaintiffs' six remaining counsel of record were fully competent to represent them in the case (*see* p. 11 *supra*).

The procedure followed by the Court of Appeals in this case, if allowed to stand, would jeopardize the supervisory authority of the District Courts over the attorneys practicing before them. The opinion of the court below is a clear warning to the District Court that any attempt to invoke the remedy of disqualification against attorney misconduct will be met on appeal by an unbendingly hostile reception, in which the presumption will be against the action taken by the District Court, rather than in favor of it.

This Court should reverse the decision of the Court of Appeals in order to make clear that the supervisory role of the District Courts cannot be so lightly brushed aside. This Court was presented with an analogous situation in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*,

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* *See Groper* v. *Taft*, 717 F.2d 1415, 1418 (D.C. Cir. 1983).

427 U.S. 639 (1976), in which the Court of Appeals had reversed the District Court's dismissal of an action for willful failure to provide discovery. This Court granted certiorari and reversed per curiam, holding that the Court of Appeals had erred by failing to apply the abuse of discretion standard of review.

3. The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent

The District Court found, on the basis of ample evidence, that Butler deliberately released irrelevant and prejudicial materials which had been ruled inadmissible by the Court, in order to circumvent the Court's rulings and prejudice the defendant (*see* pp. 3-6 *supra*). The Court of Appeals raised a "question" as to this finding, but did not (and could not) hold it to be clearly erroneous (*see* p. 12 *supra*).

Such a deliberate attempt to prejudice prospective jurors with inadmissible evidence violates the provisions of the District of Columbia Code of Professional Responsibility, including Canon 20 and Disciplinary Rule 7-108(A) (95a-96a). In its original opinion, the Court of Appeals expressed the view that there had been no violation of these provisions (*see* pp. 12-13 *supra*). On July 16, 1984, however, the court below amended its opinion to state that it had not determined whether or not Canon 20 was violated (*see* p. 13 *supra*). Thus the finding of the District Court that Butler was guilty of misconduct stands unreversed by the Court of Appeals.

The eventual holding of the Court of Appeals as to Butler was that, even if Butler had committed a deliberate violation of the Code of Professional Responsibility,

he could not be disqualified in the absence of a finding that his actions had made a fair trial impossible (*see* p. 12 *supra*). Even assuming *arguendo* that this legal standard was correct, the question whether it was met was for the informed determination of the District Court, not for the Court of Appeals. *Cf., e.g. Patton* v. *Yount,* 52 U.S.L.W. 4896, 4900 (U.S. June 26, 1984). By reaching out to make a finding on this issue itself, rather than remanding to the District Court, the Court of Appeals violated the repeated admonitions of this Court (*see* pp. 17-18 *supra*).

Moreover, the factual finding of the Court of Appeals that the materials disseminated by Butler would not irretrievably prejudice the defendant was clearly erroneous. These materials reached the prospective jurors at the time of the greatest danger of prejudicial impact, after they had been called for service and before they had come under the protection of the trial court's supervision and instructions. *Cf., e.g., Marshall* v. *United States,* 360 U.S. 310, 313 (1959). Voir dire might disclose which potential jurors had read the article inspired by Butler in *The Washington Post,* but it would confront defendant with the dilemma of accepting a tainted jury or a jury of nonreaders in a case dependent upon scientific evidence.

In any event, the Court of Appeals was wrong in holding that the District Court's power to disqualify Butler should depend upon a showing that specific prospective jurors have been tainted. The limitations of the means available to the courts to detect a prejudicial impact upon the jury panel are serious and well recognized. *See, e.g., Irvin* v. *Dowd,* 366 U.S. 717, 728 (1961); *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949) (Jackson, *J.*, concurring). By deliberately using the press to prejudice the jury venire, as found by the District Court (*see* pp. 3-6 *supra*), Butler

manifested his belief that he would succeed in tainting the jury, as well as his intention to do so. He should not be permitted to escape the consequences of his acts on the ground that the results he expected and intended were not proved to the satisfaction of the Court of Appeals.

Such a deliberate attempt to prejudice potential jurors was held to justify disqualification in *State* v. *Kavanaugh,* 52 N.J. 7, 243 A.2d 225, *cert. denied,* 393 U.S. 924 (1968), a case which involved the well-known criminal defense counsel F. Lee Bailey. After failing to persuade the trial court to permit the introduction into evidence of the results of polygraph tests of the defendants, Bailey sent a letter to the Governor of New Jersey and over 150 other persons, attacking the conduct of the case and revealing the results of the polygraph tests. The New Jersey Supreme Court, in a decision of which this Court denied review, held that Bailey should be disqualified, stating:

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial, both for a defendant and for the State. The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." 52 N.J. at 18, 243 A.2d at 231.

In the present case, as in *State* v. *Kavanaugh*, there is no basis for a finding that Butler would refrain from further misconduct in this case. Butler has a demonstrated propensity for using the press to disseminate inadmissible and prejudicial evidence (*see* p. 6 *supra*). He has shown no contrition for his misconduct in this case, insisting instead that he had a constitutional right to act as he did. The District Court was not required to take the risk that Butler would decide to abort the trial of this case by releasing further prejudicial data after two and a half months of trial (*see* p. 6 *supra*). It properly exercised its discretion to disqualify Butler to prevent such future misconduct.

Respondents and various *amici* contended before the Court of Appeals that disqualification of Butler in this case would contravene the First Amendment. This contention was not adopted by the Court of Appeals, but nonetheless calls for brief response. This Court has made it overwhelmingly clear that the First Amendment does not protect a lawyer such as Butler who deliberately circumvents the evidentiary rulings of the District Court. For example, in *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966), the Court stated:

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

See also, e.g., Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829, 837 (1978); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 564 & n.8 (1976); *id.* at 601 n.27 (Brennan, *J.*, concurring).

Thus the First Amendment clearly permits the courts to prevent the dissemination of inadmissible and prejudicial evidence. If not reversed, however, the decision below will destroy the most effective means available to the courts for preventing such abuses.

4. Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984)

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-78 (1981), the Court held that an order denying a motion to disqualify counsel in a civil case was not appealable under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The Court expressed no view as to the appealability of an order granting a motion to disqualify counsel, or of an order denying such a motion in a criminal case. 449 U.S. at 372 n.8.

During the three-year period that elapsed between the Court's decision in *Firestone Tire & Rubber Co.* v. *Risjord* and its recent decision in *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984), all of the Courts of Appeals that passed upon the question held that orders disqualifying counsel in civil cases were appealable under the *Cohen* doctrine.* Similarly, with only one exception, all of the Courts of Appeals that passed upon the issue held that disqualification orders in criminal cases were likewise appealable under the *Cohen* doctrine.**

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* *See, e.g., Groper* v. *Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983); *Glueck* v. *Jonathan Logan, Inc.*, 653 F.2d 746, 748 n.2 (2d Cir. 1981); *Greitzer & Locks* v. *Johns-Manville Corp.*, 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1024-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); *General Mill Supply Co.* v. *SCA Services, Inc.*, 697 F.2d 704, 706 (6th Cir. 1982); *Freeman* v. *Chicago Musical Instrument Co.*, 689 F.2d 715, 717-21 (7th Cir. 1982); *Gough* v. *Perkowski*, 694 F.2d 1140, 1141-45 (9th Cir. 1982); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1356-58 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); *Norton* v. *Tallahassee Memorial Hospital*, 689 F.2d 938, 941 (11th Cir. 1982), *rehearing denied*, 700 F.2d 617 (11th Cir. 1983) (en banc).

** *See Flanagan* v. *United States*, 104 S. Ct. 1051, 1053-54 n.2 (1984), and cases cited.

In *Flanagan* v. *United States*, 104 S. Ct. 1051 (1984), this Court unanimously held that orders disqualifying counsel in criminal cases are not appealable under the *Cohen* doctrine. The *Flanagan* decision naturally raises the question whether orders disqualifying counsel in civil cases are appealable. We are aware of two decisions which have dealt with this question since *Flanagan*: the decision of the court below, and the decision of the Second Circuit in *Interco Systems, Inc.* v. *Omni Corporate Services, Inc.*, 733 F.2d 253 (2d Cir. 1984). The court below held that the holding of this Court in *Flanagan* has no application to civil cases (23a-33a). The Second Circuit in the *Interco* case acknowledged that "the language of the *Flanagan* opinion might be regarded as a call to reexamine this circuit's established rule permitting interlocutory appeals of disqualification orders in civil cases," but decided to adhere to its prior decisions "until the issue is otherwise specifically determined by the Supreme Court." 733 F.2d at 254-55.

The reasoning of this Court in *Flanagan* applies to civil cases just as it does to criminal cases. The Court based its analysis of the *Cohen* criteria in *Flanagan* upon two alternative assumptions: (1) that if the disqualification order was eventually held to be erroneous on an appeal from a final judgment, the judgment would automatically be reversed without any need for a showing of prejudice; and (2) that a showing of prejudice would be required.* On the first assumption, the Court held, a disqualification order "does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" 104 S. Ct. at 1056. On the second

* The Court held that for purposes of its decision on appealability, it did not need to resolve whether or not a showing of prejudice is required. 104 S. Ct. at 1056 n.4.

assumption, the Court held, the second *Cohen* criterion would not be satisfied, because the issue of disqualification would not be completely separate from the merits of the case:

> "On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. The effect of the disqualification on the defense, and hence whether the asserted right has been violated, cannot be fairly assessed until the substance of the prosecution's and defendant's cases is known. . . ." 104 S. Ct. at 1057.

The same reasoning also applies to disqualification orders in civil cases. If such orders are viewed as subject to reversal without any showing of prejudice—an approach which has no support in precedent and which was rejected by the court below (28a-29a)—then, as in the first alternative considered by the Court in *Flanagan*, such orders would fail to meet the third *Cohen* criterion of effective unreviewability on appeal from a final judgment. On the other hand, if disqualification orders in civil cases are subject to reversal only on a showing of prejudice. then, as in the second alternative considered by this Court in *Flanagan*, the issue of prejudice cannot be divorced from a consideration of the entire record after the entry of final judgment.

The court below declined to apply the reasoning of *Flanagan* to civil cases, essentially on the ground that it would be impossible to show prejudice from a disqualification order at the end of the case (28a-32a).* The same

* The Court of Appeals also suggested that counsel should have a right to appeal a disqualification, and not only their clients (32a-33a). Even if it were sound, this suggestion would go only to the issue of standing to take an appeal, not to the issue of the time when the appeal should be taken.

argument, however, could also be made in criminal cases, and there is no support for the further suggestion of the court below (31a-32a) that the right to counsel in a civil case is more absolute than the Sixth Amendment right to counsel in a criminal case.

The present appeal dramatically illustrates the unwisdom of permitting interlocutory appeals from disqualification orders in civil cases. This appeal has already delayed the further progress of the case for more than six months. It has drawn the Court of Appeals into an ill-informed and fragmentary prejudgment of some aspects of the case. In the absence of this appeal, the trial would have gone forward with the six counsel of record for plaintiffs who were not affected by the District Court's disqualification order. By this time, the results of the trial would be known, and any appeal of the disqualification order could have proceeded against a full record encompassing the case as a whole, and not merely pieces of it.

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Dated: July 24, 1984

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals
Dated May 29, 1984

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5039

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, et al.

JAMES G. BUTLER, NICHOLAS R. ALLIS and the law firm of BUTLER, JEFFERSON, DAN & ALLIS, APPELLANTS

v.

RICHARDSON-MERRELL, INC., a Delaware Corporation

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 80-1258)

Argued March 22, 1984

Decided May 29, 1984

Jacob A. Stein, with whom *Robert Muse* and *Robert M. Weinberg* were on the brief, for appellants. [2]

Lawrence E. Walsh, with whom *Guy M. Struve, Whitney L. Schmidt, Vincent H. Cohen* and *Robert B. Cave* were on the brief, for appellee, Richardson-Merrell, Inc.

Boisfeuillet Jones, Jr. and *Carol D. Melamed* were on the brief for *amicus curiae,* Washington Post Company, urging reversal.

Anthony Z. Roisman was on the brief for *amicus curiae,* Trial Lawyers for Public Justice, urging reversal.

Stephen H. Glickman and *Arthur B. Spitzer* were on the brief for *amicus curiae,* American Civil Liberties Union Fund of the National Capitol Area, urging reversal.

Barry J. Nace entered an appearance for *amicus curiae,* Association of Plaintiff's Trial Attorneys of Metropolitan Washington, D.C., urging reversal.

Before: WALD and MIKVA, *Circuit Judges,* and RICHEY, **United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* WALD.

Concurring opinion filed by *District Judge* RICHEY.

WALD, *Circuit Judge*: This appeal arises out of a lawsuit filed in May, 1980, in which plaintiffs Cynthia and John Koller and their daughter Anne Elizabeth Koller allege that Mrs. Koller's ingestion during the first trimester of her pregnancy of the anti-nausea drug Bendectin, which is manufactured by the defendant, caused the severe limb malformations with which her daughter was born. Shortly before trial was to begin, two separate episodes gave rise to allegations of misconduct against plaintiffs' counsel and a motion by the defendant to impose sanctions against them. Following extensive discovery and hearings, the district court in its ruling of Jan[3]uary 6, 1984, revoked the

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

pro hac vice appearances of Nicholas Allis and James Butler and disqualified their firm, Butler, Jefferson, Dan & Allis, from further representation of the plaintiffs.[1] The court held that Allis had attempted to "thwart a true investigation of a crucial witness" by obtaining a statement from his (Allis')secretary declaring that representatives of the defendant were pressuring her to sign a false statement that the Koller case was a fraud. The court also determined that Butler, in an unrelated episode, had deliberately circumvented the court's pretrial evidentiary rulings when he released to Morton Mintz, a Washington Post reporter, information that had recently been ruled inadmissible at trial on the alleged connection between Bendectin and the congenital deformities of fourteen infants. Allis, Butler, their law firm and the plaintiffs appeal from the district court's order.[2]

We must determine first whether we have jurisdiction to review this interlocutory order in light of the Supreme Court's recent decision in *Flanagan* v. *United States,* 104 S.Ct. 1051 (1984), holding that there was no jurisdiction to entertain an interlocutory appeal by defendants in a criminal case of an order disqualifying their counsel. We conclude that an order disqualifying counsel in a civil proceeding, at least in the circumstances present here, is immediately reviewable. We conclude on the merits that

[1] Koller v. Richardson-Merrell, Inc., Civil No. 80-1258 (D.D.C. Jan. 6, 1984). All orders, memorandum opinions, hearings, depositions and affidavits in this docket are hereinafter cited only by date and by page number in the Joint Appendix (J.A.). Other items of record are cited to the Joint Appendix only.

[2] Notice of Appeal was filed on January 19, 1984, by counsel for Butler, Allis and the Butler law firm. J.A. 242. The plaintiffs below are listed as parties to the appeal in Brief for Appellant at 2.

the district court erred in revoking the *pro hac vice* ap-[4] pearances of Allis and Butler and in disqualifying the Butler firm. We therefore reverse and remand with instructions to reinstate the *pro hac vice* appearances of plaintiffs' counsel.

I. Background

In May, 1980, plaintiffs filed suit in federal district court alleging that Anne Koller had been born without arms and legs because her mother, Cynthia, had taken Bendectin, an anti-nausea drug manufactured by the defendant, Richardson-Merrell,[3] during the first trimester of her pregnancy. In January, 1981, plaintiffs retained the law firm of Butler, Jefferson, Dan & Allis to represent them in the litigation. James Butler and Nicholas Allis were admitted *pro hac vice* to appear in the case.[4] Two key issues that emerged during pretrial discovery were whether Mrs. Koller had in fact taken Bendectin during the critical first three months of her pregnancy[5] and whether Bendectin was a

[3] Defendant Richardson-Merrell is now a subsidiary of the Dow Chemical Co., and is known as Merrell-Dow Pharmaceuticals, Inc. *See* Brief for Appellee at i.

[4] Butler was admitted *pro hac vice* pursuant to an appearance entered on January 26, 1981. J.A. 102. Allis was permitted to appear, apparently *pro hac vice*, *see infra* p. 32 & n.45, as a member of the Butler firm and a member of the bar of the District Court for the District of Columbia. *See* Hearing on Oct. 13, 1982, J.A. 561-62. Any subtle distinctions between their status have no significance in this case. *See infra* pp. 32-33.

[5] The plaintiffs appear to acknowledge that, even assuming Bendectin is a teratogen, Mrs. Koller must have taken the drug during the first 40 days of pregnancy—the period in which the fetus' limbs form—in order for Bendectin to have caused the particular limb malformations Anne Koller was born with. *See* Hearing of Feb. 10, 1983 (Allis), J.A. 603-04.

teratogen—*i.e.*, a substance that causes birth defects. After two-and-a-half years of pretrial discovery and preparation, the events described below brought a virtual halt to proceedings on the merits. [5]

A. *The Janowski Episode*[6]

On the evening of Sunday, December 26, 1982, Richard Daum, a paralegal with the Butler firm, notified Allis that he had just received a telephone call from Krystyna Janowski, Allis' secretary. According to Daum, Janowski had told him that she was being threatened and bribed by George Barnes, an investigator employed by defendant's law firm, Davis, Polk & Wardell, to induce her to sign a false statement to the effect that Cynthia Koller had not taken Bendectin in the first trimester of her pregnancy.[7]

The following day Allis decided, with other members of the Butler firm, to talk with Janowski. After a brief telephone conversation with Janowski, Allis went to meet her at the hospital where she was tending to her own prematurely-born infant. There she repeated in greater detail what she had said the previous evening: that the defendant, through its investigator Barnes, was pressur-

[6] Reviewing the facts of this episode is no simple matter. First, the court's "findings" are limited to what we can glean from its one-paragraph summary of the episode. For details, we are forced to sift from the record, with the guidance of counsel's briefs and oral arguments, the more or less undisputed facts. Second, the status of the testimony of Janowski herself, who in part corroborated and in part contradicted plaintiffs' witnesses, is very ambiguous. *See infra* pp. 13-14.

[7] *See* Affidavit of Richard Daum, June 5, 1983, J.A. 316-18; Hearing of Mar. 10, 1983 (Allis), J.A. 657-61.

ing her to sign what she said was a false statement that Mrs. Koller had admitted to Janowski that she had not taken Bendectin until after the first trimester of her pregnancy; that this pressure was in the form of promises to take care of her "wants and needs" and her child's medical expenses, and threats to reveal her criminal record; that in fact she had never had any such conversation with Mrs. Koller.[8] Although Janowski seems to have [6] admitted during this conversation that she had called Davis, Polk at some point, she insisted that it was only at the instigation of the defendant and denied saying anything about the *Koller* case being fraudulent.[9] Janowski indicated to Allis her willingness to sign a statement confirming these events.[10]

That evening Allis and Humphries, an investigator employed by the firm, went to Janowski's apartment with a short written statement for Janowski to review and sign. They recorded the conversation with a small concealed tape recorder. The transcripts of the tape[11] reflect that during the conversation Janowski once again repeated the story she had related to Allis earlier that defendants were trying to induce her to sign a false statement about Mrs. Koller, and she confirmed her willingness

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[8] *See* Hearing of Mar. 10, 1983 (Allis), J.A. 671-75, 684, 692-95.

[9] *See, e.g., id.*, J.A. 674-77, 692-93; Hearing of Mar. 15, 1983 (Allis), J.A. 816-17. The defendant does not dispute the essential points of Allis' testimony about his conversation with Janowski, although counsel said in oral argument that Janowski "dissembled" in making these statements to Allis.

[10] *See* Hearing of Mar. 10, 1983 (Allis), J.A. 671-73, 704.

[11] The record contains two versions of the transcript—one submitted by each party—which vary in inconsequential ways. Both parties have referred to defendant's version, appearing at J.A. 1467-1500; we do so as well.

at that time to sign a statement for Allis describing those inducements.[12] She took the statement pro[7]duced by Allis,

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[12] This is a summary of the transcript: Allis, Humphries, and Janowski discussed briefly the health of Janowski's baby, arrangements for getting her paycheck and vacation pay later that week, and Janowski's hostility toward the firm and dissatisfaction with her job and salary. J.A. 1469-76. Janowski then began to talk about feeling harassed by Barnes, who had been coming to see her at the hospital and her house—"[r]ound the clock harassment." Janowski continued, "Well some of the conversation going around about money is, you know, very lucrative. And I'm thinking to myself, Jesus Christ, you know, this is not my fight." J.A. 1477. Humphries interjected, saying he had seen such pressure before and he sympathized with her. Janowski went on about Barnes:

> "You know, some of the things he pulled trying to ingratiate himself backfired. Like he'll walk around here and he'll say Jesus, look how you live [ ]. My God, bring a little baby to this. You know they don't take care of you. And we'll—we'll right all these wrongs . . . . We'll find a beautiful apartment for you."

J.A. 1479-80. Humphries ("F.H.") then asked, "Honestly, does he still have any reasons to feel this—this idea that somehow ah you know or you said that Mrs. Koller talked to you?" Janowski ("K.J.") replied,

> K.J. No, he wants me . . . he will bet on somebody to say it. They don't give a hoot . . . . They want someone to recall a conversation with Mrs. Koller that she never took Bendectin during that first trimester you know, that she may have taken aspirin, or whatever the hell. I don't know. I wasn't involved then. But they have a transcript of the alleged conversation that they want. You know. "Do you remember? Think about a little more of the conversation." That type of thing.
>
> F.H. Well what do you think about that—that they say they have some transcript.
>
> K.J. Well, that's criminal fraud. I mean if somebody actually said that . . .
>
> F.H. Did you ever talk to Mrs. Koller?
>
> K.J. Well I've talked to her, but only, you know, to ask her if she wanted coffee and oh, you know, get her on the telephone for Nick Allis . . . .

made minor corrections and a few comments confirming its accuracy, and signed it. At Allis' suggestion she wrote

F.H. Did she have . . . Did she ever mention to you anything about the pill or the Bendectin?

J.A. 1480-81.

K.J. I have no trouble with making a statement to that affect [sic] you know. The only contact I would've had with Mrs. Koller, personal contacts. They don't even know about is because it never came up in the conversation. I had sent her a book called "How to Raise a Retarded Child," and said look, I had a little girl once and this book was tremendously interesting to me.

. . . .

And I specifically didn't mention that to them because they said to me, you know, what's been the extent of relationship with Mrs. Koller . . . ? I specifically didn't mention that because then they'd jump up and say ah haa—she was a personal friend of yours and may have confided in you.

J.A. 1488. (The above excerpt appears on a page of the transcript that is out of sequence in the appendix.) Janowski then returned to the subject of harassment by Barnes. She indicated that she might talk to the lawyer "they" had arranged for her to talk to and ask him to "get some kind of restraining order so that nobody comes to see me or at least don't come to see me at the hospital. And so I can get my paycheck and go away. I want to go far away—go to Chicago, go to Mexico, you know." J.A. 1482. Humphries left on a pretext in order to change the tape and returned.

After more discussion about the harassment, Humphries said, "I think the one way that you are going to keep these guys from pestering you and bothering you is to declare once and for all in the clearest, simplest way, that you did not hear Mrs. Koller ever say that she didn't take Bendectin." Janowski repeated, "I have never had any conversation with Mrs. Koller—other than would you like some coffee." J.A. 1490. Humphries stressed that the harassment would probably continue unless she made a statement "saying that what they're trying to put into your mouth isn't true, you know."

K.J. . . . I have no quarrel with that, you know—bring me or send me such a statement or pull it out of your jacket pocket by coincidence—I have no problem.

[Continued]

at the bottom of the statement, "Under penalty of perjury, I swear that the above typed [8] statement is true and correct." The statement reads as follows:

> Last week I was in a state of severe agitation and depression and felt a lot of hostility towards the law [9] firm of Butler, Jefferson, Dan & Allis. Today I feel calm and my mind is free and clear. At no time did I ever hear Cynthia Koller or anyone else say that Cynthia Koller did not take Bendectin. George L. Barnes & Associates, Inc. had been trying to get me to sign a statement saying that I heard Cynthia Koller say that she did not take Bendectin. Such a statement would be false and I would not sign such

[12] [Continued]

F.H. Pull it out Nick [Humphries chuckling] By golly, it just so happens . . .

K.J. This saves me the trouble of typing one myself.

. . .

K.J. . . . I have to cross something out to look like I did something.

F.H. That's right! You understand . . . .

J.A. 1493-94. As she was reading the statement, Janowski noted a spelling error and made several comments: "This is true. They've been making tremendous promises above relocating me within twenty-four hours and make it sound, it sounds to me like a . . . a plane would be chartered to fly me away that would . . . to sunny climes, or whatever. Really, it's been quite flattering. I've never had such attention." "It would have been fun to see what they were willing to pay for that statement. I mean, just for the hell of it!" J.A. 1495.

After more discussion about her dissatisfaction at work and the pressures she had been under, Janowski inquired, "This is not relating to any ah . . . remuneration. But I would like them to have my check and my paycheck for Luis on Friday. It's pretty important to me." Allis agreed. She then stated, "These people aren't going to stop at this. They're going to go to try to find somebody else . . . You think it makes any difference to them who they get." The tape ends at that point.

> a statement for that reason. Mr. Barnes and others have promised that if I signed such a statement they would be able to relocate me and would take care of all my wants and needs including renting a comfortable apartment for me and by [sic] baby. Any conversation I had with George Barnes, Patrick Ryan or any other person from Davis, Polk & Wardwell or George Barnes & Associates was at a time when I [10] was extremely upset and under *great* emotional stress. At the present time my mind is free and clear and everything in this statement is true and correct. I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else.

J.A. 1504 (emphasis in original). Janowski also gave Allis a statement in her handwriting describing the conversation that she said defendants wanted her to "recall" and swear to.[13] She indicated that she would be willing

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[13] The handwritten statement reads as follows:

> Are You OK?
>
> . . . I'm just worried—
>
> You're worried about all these tests?
>
> No, I'm worried about the trial.
>
> Are you afraid it'll be called off again?
>
> No, I'm worried about the experts. Maybe they won't be able to convince the jury that Bendectin is a teratogen.
>
> I don't think that's a problem. Our problem is going to be convincing the jury that you took Bendectin during the first trimester when we know—and you know—that you didn't.
>
> Jim Butler says he can convince the jury it's midnight, even if they can see the sun shining through the courtroom windows.

to make a longer, more detailed statement in the immediate future. She also suggested that she might go to Mexico to get away from the pressures she was under. Finally, Allis discussed with Janowski the possibility of bringing a typewriter to her apartment to allow her to work at home.[14] [11]

On the following day, December 28, 1982, the Butler firm received a copy of a letter which Davis, Polk had sent to the court.[15] The letter stated that Davis, Polk had received two calls on December 22 from a woman identifying herself as Allis' secretary and stating that the *Koller* case was fraudulent. The next day defense counsel had called the court to attempt to set up a conference before Christmas. (In oral argument we learned that in this December 23 call, made several days before the defense first contacted plaintiffs' counsel, defense counsel also told the court's law clerk the substance of Janowski's call.) The letter continued; after identifying the caller as Janowski, defense counsel arranged for "independent counsel" to advise her.[16] The letter stated further that

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Janowski then drew a line and wrote, "The above 'conversation' is the one they want me to 'recall' having," and signed the statement. J.A. 1505.

[14] *See* Hearing of Mar. 15, 1982 (Allis), J.A. 849-50.

[15] The letter appears at J.A. 1461-62.

[16] Although the letter did not identify this "independent counsel," it was Carl Schuck, a member of the Los Angeles firm of Overton, Lyman & Prince. As the transcript of the December 27 conversation shows, *supra* note 11, Janowski made some mention of Schuck to Allis earlier in the day. According to Richard Daum, the paralegal with whom Janowski first spoke on December 26, she denied that Schuck was acting as her lawyer and talked about him as another of the representatives of defendant and "part of their efforts to have her sign a statement which she believed to be false." Affidavit of Daum, Jan. 5, 1983, J.A. 317-18. Allis testified that it was not until he received the Davis, Polk letter on December 28 mentioning "inde-

Janowski had been threatened by the Butler firm with imprisonment if she persisted in a course of disclosure. The letter concluded, "We respectfully request a conference with the Court so that it may, if it deems fit, prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of the information and, if appropriate, inform the Court." [12]

The same day, December 28, Butler prepared and sent to the court a letter in response, read and approved by Allis, in which he described what contact the firm had had with Janowski in the previous two days and the information she had given them.[17] He added that the firm had learned that, according to Janowski, representatives of the defendant had offered her $15,000 to sign a statement that the case was fraudulent.[18] Butler expressed concern over the situation, especially defendant's conduct, and waived the attorney-client privilege as to any conversations between Janowski and Mrs. Koller. He also enclosed a copy of the statement signed by Janowski the previous evening and a copy of the handwritten description of the purported conversation with

pendent counsel" that it occurred to him that Janowski might be in some way represented by Schuck. Hearing of Mar. 15, 1983 (Allis), J.A. 843-44. Plaintiffs dispute Schuck's independence. *See infra* note 62.

[17] The letter appears at J.A. 1501-03.

[18] On December 27, Janowski called Carol Freeman, a close friend who worked at a law firm in Houston, and told her that an investigator for the defense in the *Koller* case wanted her to remember a telephone conversation that never took place, and offered her $15,000 to testify to the conversation. Affidavit of Carol Freeman, Jan. 17, 1983, J.A. 321. According to Allis, Freeman communicated this information to Richard Daum on the same day. Hearing of Mar. 10, 1983 (Allis), J.A. 668-69.

Mrs. Koller that, according to Janowski, Barnes wanted her to "recall."

On December 29, defense counsel moved for permission to take expedited discovery of Janowski and others. On the same day, one of defendant's attorneys attempted unsuccessfully to get a statement from Janowski. On January 3, 1983, Carl Schuck, the attorney that the defendant arranged for and paid to represent Janowski, wrote to the court stating that his client now disavowed the December 27 statement she had signed for Allis, and that the statement had been obtained under duress and with an offer to continue paying her salary and fringe [13] benefits, including medical benefits for her baby, without requiring her to perform any work.[19]

First, the district court authorized the depositions of Janowski and the father of her child,[20] and additional discovery into the question of when Mrs. Koller took Bendectin, including the depositions of Barnes, Humphries, and the Kollers.[21] The court also ruled as to all these depositions that the plaintiffs' waiver of the attorney-client privilege could not be limited to conversations between Janowski and Mrs. Koller, but would extend to "any discussion relating to the issue of when Cynthia Koller took Bendectin during her pregnancy." [22] Janowski

[19] Schuck's letter appears at J.A. 1511-12.

[20] These depositions were conducted before a Special Master in Los Angeles.

[21] These additional depositions were ordered at a hearing on Jan. 18, 1983. *See* J.A. 582-84.

[22] The Special Master initially issued this ruling as to the Janowski deposition. The ruling was appealed by plaintiffs. In its Order and Memorandum Opinion of Jan. 19, 1983, J.A. 137, the court upheld the ruling and extended it to all future depositions and testimony on the issue.

testified in essence that Mrs. Koller had admitted to her that she had not taken Bendectin in the first trimester,[23] and that she called the Davis, Polk office with this information,[24] but that when Barnes and other representatives of the defendant tried to get a statement from her she had second thoughts. She testified that she lied to Allis, telling him that the defense was bribing her to sign a false statement,[25] and that she signed the December 27 statement for Allis, even though it was false, in return for a promise of continued employment.[26] Plain-[14] tiffs impeached Janowski's credibility with evidence of a history of mental instability, job-related dishonesty and criminal activity, admitted propensity for lying, hostility toward the Butler firm, financial benefits from defendant's firm, prior inconsistent statements, internal inconsistencies, and contrary record evidence.[27] Janowski's counsel, Schuck, acknowledged at the deposition that the defense was paying for the costs of his representation

[23] Deposition of Janowski, Jan. 12, 1983, J.A. 4444-47.

[24] *Id.*, J.A. 4534-36.

[25] *Id.*, J.A. 4556-68.

[26] *Id.*, J.A. 4572-91.

[27] *See* Hearing of Jan. 31, 1983 (Butler), J.A. 596-11 to 596-29 (summarizing impeachment evidence). Although the defendant disputes some of this impeachment evidence, it does not put her forward as a credible witness and it argued to the district court that her credibility was not at issue. Furthermore, the district court viewed as irrelevant Janowski's credibility in general and, in particular, the truth of her assertion that she heard Mrs. Koller admit not taking Bendectin; the court does not appear to have relied on Janowski's testimony in its analysis. *See, e.g.*, Hearing of Mar. 2, 1983, J.A. 621; Hearing of Mar. 7, 1983, J.A. 635, 640, 644. Therefore, although Janowski's testimony is part of the record and would ordinarily seem critical, for the above reasons we give it little weight.

of Janowski, as well as a $600 per month apartment, a rental car, and medical expenses for her baby (to be reimbursed by insurance).[28]

After reading Janowski's deposition and hearing argument from both sides, the court orally ordered the depositions of Allis and one of defense counsel, Patrick Ryan, who had attempted to take Janowski's statement on behalf of the defendant, on February 9. J.A. 600-1. On March 7, the court ordered an evidentiary hearing, during which defense counsel examined Butler, Allis, Dan (another attorney with the Butler firm), Daum, [15] Humphries, Allen Eaton (one of plaintiffs' Washington counsel), and Mrs. Koller. In the depositions and the evidentiary hearing, defense counsel was permitted to inquire in detail into numerous discussions between the plaintiffs and their counsel and within the Butler law firm itself during the previous year and, with respect to the week of December 26 through December 31, into every telephone call, every meeting, and every action within the Butler firm that had any bearing on the case.

Initially, as evidenced by its ruling on the attorney-client privilege and on the scope of additional discovery, the court was concerned with whether Mrs. Koller had taken Bendectin during the critical period as she claimed, and with what counsel knew about that matter. As far

[28] *See* Deposition of Janowski, Jan. 27, 1983, Statement of Schuck, J.A. 1109-13. Defendant contends that Schuck alone determined that the expenses were necessary for Janowski's protection, and that the cost of counsel, the security apartment and other expenses would willingly have been shared if plaintiffs' counsel were so inclined. Plaintiffs dispute these contentions. We express no view as to the propriety of defendant's conduct in this regard. *See infra* pp. 45-46.

as we can tell, this new inquiry gave rise to no motions or rulings by the court at that time based on the supposition that fraud had occurred; the court appeared to be prepared to send to the jury the conflicting evidence on the critical issue of when Mrs. Koller might have taken Bendectin.[29] By March 7, when the court ordered evidentiary hearings into the Janowski episode, the attention of the court had shifted to the question of precisely what Allis' intentions were in preparing and presenting to the court Janowski's December 27, 1982, statement.[30]

Allis testified that his intention was to pursue zealously the interests of his clients, the legitimacy of whose claim he had no reason to doubt. In accordance with his clients' interests, he sought to ascertain the facts surrounding [16] the episode and then, especially in view of the possibility that Janowski might go to Mexico, to obtain a signed statement affirming the essentials of what Janowski had repeatedly related and what he believed to be true—*i.e.*, that representatives of the defendant were pressuring her to sign a false statement "recalling" a conversation in which Koller admitted not taking Bendectin and saying that the case was fraudulent.[31] Allis acknowledged that, in the event Janowski

[29] At a hearing on March 2, the court said: "As far as the merits of Mrs. Koller's case was concerned, Ms. Janowski's testimony can be totally disregarded by the jury. Only the jury can make a determination of whether she's telling the truth or not." J.A. 626.

[30] At the March 2 hearing the court stated that its "major concern" was "what counsel did with respect to Ms. Janowski once it became clear that she had started talking, and excuse the vernacular, out of school." J.A. 627. *See also* Hearing of Mar. 7, 1983, J.A. 630-35.

[31] *See, e.g.*, Hearing of Mar. 10, 1983 (Allis), J.A. 685-87, 692-94, 700-02.

had made such a statement to the defense, the December 27 statement would be a "retraction" of that prior statement.[32]

Allis also acknowledged that he had a strong suspicion by the evening of the 27th that, despite her denials, Janowski might at some point have said something to encourage Barnes and the defendant to the effect that the case was fraudulent.[33] Furthermore, at least by the morning of the 28th when defendant's letter arrived, he and the firm had learned that Janowski had told defense counsel that the case was fraudulent.[34] Allis testified, however, that he still believed without reservation that any such communication was false, and that Barnes and [17] others were pressuring her to sign a statement repeating the false charge.[35]

B. *Butler's Release of Inadmissible Materials to the Press*

In the midst of these events, an unrelated episode involving James Butler also aroused the court's ire and

[32] *See id.*, J.A. 706-07.

[33] *See, e.g., id.*, J.A. 674-77, 683.

[34] There was some dispute in the testimony concerning precisely when various members of the firm, especially Allis, learned—and not merely suspected or inferred—that Janowski had told the defense that Mrs. Koller had not taken Bendectin in the first trimester. The dispute does not appear to us to be either clearcut—there is no direct testimony that Allis actually *knew* of such a statement to the defense—or critical. Allis himself testified, first, that he believed at the time he obtained her statement that Janowski had probably indicated something to the defense to the effect that the case was fraudulent, and second, that one purpose behind the statement was to get a truthful retraction of any such prior false statement. It was Allis' intent that the court viewed as critical.

[35] *See, e.g.*, Hearing of Mar. 10, 1983 (Allis), J.A. 753.

resulted in the revocation of his *pro hac vice* appearance. In support of their contentions that Bendectin was a teratogen and had caused Anne Koller's birth defects, plaintiffs sought to introduce evidence of numerous other instances in which women had taken Bendectin during the critical period and, like Mrs. Koller, had borne children with severely malformed or absent extremities. Defendant moved to exclude this evidence. On January 17, 1983, the district court issued a pretrial evidentiary ruling excluding the "drug experience reports" (DERs) regarding two of those instances—Marco Cordova and Pauline Sands—on which plaintiffs' experts had intended to rely in their testimony. J.A. 131. The court concluded that the dangers of prejudice and jury confusion outweighed any probative value that these case histories might have. J.A. 132-36. In another order dated January 28 and filed January 31, 1983, the court ruled that, of the many other DERs filed with the FDA concerning the alleged link between Bendectin and birth defects, plaintiffs could introduce only five, each of which must have been initiated within one year of the birth of the deformed child. J.A. 157-66.

On January 28, 1983, James Butler sent to FDA Commissioner Hayes fourteen DERs for severely deformed children whose mothers had allegedly taken Bendectin, including Koller, Sand and Cordova. He enclosed medical information and photographs of the children along with a letter urging the FDA to "take this noxious product off the market before it can do any more harm." J.A. 1513. [18] At the same time, Butler sent copies of the DERs and his letter to Hayes to Morton Mintz, a reporter with the *Washington Post* who had often written about drug

companies and the FDA. J.A. 1515. Mintz contacted Butler for an interview which took place on February 1, 1983. Mintz also contacted Merrell-Dow, Richardson-Merrell's successor company.[36]

On February 7, 1983, the Washington Post carried an article by Mintz reporting Butler's claims that Bendectin was a teratogen, along with the comments of FDA officials, "[t]he FDA's most relentless critic, the Public Citizen Health Research Group," and Merrell-Dow, all of which took the position that there was no evidence establishing that Bendectin caused birth defects. The company's representative was quoted as specifically denying that there was a causal link in the Koller case, and as stating in addition that "there is a serious question when Mrs. Koller may have taken Bendectin." J.A. 1516. At the time the Mintz article appeared, the jury panel for February had just been drawn and the parties were preparing for jury selection and a trial expected to commence in the next few weeks. Primarily as a result of the article and the disqualification proceeding it helped to trigger, the trial was postponed.

In two affidavits filed in February and May, 1983, in response to a motion by the defendant to impose sanctions on the Butler firm, Butler denied any intent to influence the jury in circumvention of the January evidentiary rulings. J.A. 271, 273-74. Butler stated as his sole motivation that over two years of research on Bendectin had convinced him that it was a dangerous drug that should be taken off the market without further delay. Apparently as an explanation for the particular timing of the

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[36] *See supra* note 3.

release on January 28, he averred that not until January had he received authorization from the parents to release [19] the information to the FDA and the press. J.A. 273. He declined the court's suggestion that he testify in person as to the explanation for his conduct.

C. *Proceedings on the Motion to Disqualify*

On February 7, the day the Mintz article was published, the defendant moved to disqualify the Butler firm on the basis of both the Janowski episode and, especially, Butler's release of the DERs. After an evidentiary hearing in March, 1983, on the Janowski episode, the court issued on April 29, 1983, an Order to Show Cause why the Butler firm should not be disqualified from further representation of plaintiffs because of the conduct of both Butler and Allis:

> 1) James Butler's January 31, 1983, release of information concerning defendant's experience with Bendectin, Thalidomide, and MER-29, including fourteen [DERs], to the [FDA] and the Washington Post in an effort to prejudice the jury pool awaiting selection for the contemplated trial of this action in February or March and to bring inadmissible evidence before the jury pool in contempt of three separate evidentiary rulings previously entered by the Court;
>
> 2) Nicholas Allis' preparing and obtaining a statement from Krystyna Janowski retracting her previous statement to defendant that the instant case was fraudulent without regard for the truth of Ms. Janowski's retraction in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement."

J.A. 207-08. After additional hearings in June and July, again focusing primarily on Allis' conduct in the Janowski episode, the court issued its ruling on January 6, 1984, revoking the *pro hac vice* appearances of Butler and [20] Allis and disqualifying the firm from further appearances in the case.

The court determined first that because "an attorney's admission *pro hac vice* in a case is the granting of a privilege and not a right," the revocation of *pro hac vice* admission was similarly discretionary and was justified whenever "the conduct of the attorney was so impermissible as to warrant" such a sanction. Memorandum Opinion of Jan. 6, 1984, at 4-5 [hereinafter cited as "Opinion"], J.A. 236-37. The court went on to find that the conduct of both Allis and Butler was "so impermissible" as to warrant revocation of their appearances and disqualification of their firm.

The court held that "[t]here is no doubt that Allis, under the broad provisions of Canon 7 and Canon 2 of the Code, has the duty and ethical obligation to not only zealously pursue the interests of his clients but also to investigate whether Cynthia Koller was committing a fraud upon the court thereby making this suit worthless and a waste of judicial resources," citing DR 7-102(A) (3), 7-102(A) (6), and DR 2-110(B)(1). Opinion at 6, J.A. 238. The court found that Allis' primary purpose in securing the statement from Janowski was to obtain a "retraction." In addition the court found fault in

> 1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the court of the results of his "investigation"; 3) Allis' failure to read the prepared statement line-by-line to Janowski to insure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27.

Opinion at 6-7, J.A. 238-39. The court concluded,

> At best, Allis' conduct can be characterized as an attempt to thwart a true investigation of a crucial [21] witness in this case in pursuit of protecting the interests of his clients. Clearly, this is not the nature of an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court. *See* DR 7-102(B)(1).

Opinion at 7, J.A. 239.

Turning to the conduct of James Butler, the court found that "Butler's knowing release to the Post of information previously ruled inadmissible . . . was a flagrant circumvention of the Orders of this Court." Opinion at 8, J.A. 240. Butler's refusal to supplement his affidavits by explaining his action in court "merely buttress[es] the Court's conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings." *Id.*

Observing that disqualification of the Butler firm would not be fatal to the plaintiffs' case insofar as "remaining

counsel [could] provide the plaintiffs with competent counsel," *id.*, the court concluded that "the course of conduct of plaintiffs' counsel as a whole was so impermissible as to warrant this Court's exercise of its discretion to revoke the *pro hac vice* appearances of Nicholas Allis and James Butler, thereby disqualifying the Butler firm from further representation of the plaintiffs in this case." Opinion at 9, J.A. 241.

Plaintiffs and their counsel appealed. On their emergency motion, we stayed all proceedings pending an expedited appeal.[37] We determine first whether we have jurisdiction to review this interlocutory order.

II. Reviewability

The final judgment rule embodied in 28 U.S.C. § 1291 bars interlocutory appeals in all but a small class of [22] orders "which finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To fall within this narrow exception, the order for which review is sought, "[f]irst, 'must conclusively determine the disputed question'; second, it must 'resolve an important issue completely separate from the merits of the action'; third, it must 'be effectively unreviewable on appeal from a final judgment.' *Flanagan* v. *United States*, 104 S.Ct. 1051, 1055 (1984) [hereinafter cited as

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[37] Koller v. Richardson-Merrell, Inc., No. 84-5039 (D.C. Cir. Jan. 27, 1984), J.A. 243.

"Flanagan"] (*quoting Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

In *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-78 (1981), the court held unreviewable an order denying a motion to disqualify counsel in a civil case, leaving open the question of the appealability of an order granting such a motion or an order in a criminal case granting or denying such a motion. In the years following *Firestone*, all courts of appeal that considered the question, including this court in *Groper* v. *Taff*, 717 F.2d 1415, 1417 (D.C. Cir. 1983), concluded that orders disqualifying counsel in civil cases were appealable under the standards articulated in *Cohen* and *Coopers & Lybrand*.[38] In *Groper*, we emphasized that "an order [23] granting disqualification in a civil case is, as a practical matter, 'effectively unreviewable' on appeal from a final judgment on the merits." 717 F.2d at 1417. We cited *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1026-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981), in which the Fifth Circuit considered at length the application of the *Cohen* test to disqualification orders. The court in *Duncan* concluded that the effect of the disqualification order is "immediate and measurable. The party opposing the motion is abruptly deprived of his

[38] *See, e.g.*, Greitzer & Locks v. Johns-Manville Corp., 710 F.2d 127 (4th Cir.), *cert. denied*, 103 S. Ct. 364 (1982); General Mill Supply Co. v. SCA Serv., Inc., 697 F.2d 704, 706 (6th Cir. 1982); Gough v. Perkowski, 694 F.2d 1140, 1141-45 (9th Cir. 1982); Norton v. Tallahassee Memorial Hospital, 689 F.2d 938, 941 (11th Cir. 1982), *reh'g denied*, 700 F.2d 617 (11th Cir. 1983); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 717-21 (7th Cir. 1982); Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748 n.2 (2d Cir. 1981); Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020, 1026-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981).

counsel, and, provided he desires to proceed with his action, the litigation is disrupted while he secures new counsel." *Id.* at 1027. In addition, the court saw little possibility of vindication on appeal from a final judgment. It would be, the court pointed out, "an almost insurmountable burden" for the losing party "to show that he lost the case because he was improperly forced to change counsel." *Id.* (quoting *Armstrong* v. *McAlpin*, 625 F.2d 433, 440-41 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981)).

Very recently, however, the Supreme Court determined in *Flanagan* v. *United States*, 104 S.Ct. 1051, that a disqualification order in a criminal case was not immediately appealable.[39] At the outset the Court stressed that the policy underlying the final judgment rule "is at its strongest in the field of criminal law," *id.* at 1054 (quoting *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)), and that exceptions permitting interlocutory appeals in criminal cases were accordingly very rare.[40] The rationale for such a stringent application [24]

[39] The Court thus overruled numerous contrary decisions of the courts of appeals. *See Flanagan*, 104 S.Ct. at 1053 n.2, and cases cited, *But see* United States v. Greger, 657 F.2d 1109, 1110-13 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 189 (1983) (disqualification order in criminal case not immediately appealable).

[40] The collateral order doctrine has thus far been interpreted to permit interlocutory appeals in criminal cases only in three narrow circumstances: an order denying a motion to reduce bail, Stack v. Boyle, 342 U.S. (1951), which would become moot on conviction, and orders denying motions to dismiss an indictment on grounds of double jeopardy, Abney v. United States, 431 U.S. 651 (1977), or the speech or debate clause, Helstoski v. Meanor, 442 U.S. 500 (1979), both of which guarantee the right not to be tried at all. *See Flanagan*, 104 S.Ct. at 1055.

of the final judgment rule in criminal cases lies in the common interest of the defendant, the prosecution and the public in the prompt adjudication of guilt or innocence, an interest embodied in the constitutional right to a speedy trial. *Id.* at 1054-55. The defendant now argues that, although it has not actively opposed immediate review in this case, "the reasoning of the Court in *Flanagan* supports the conclusion that orders disqualifying attorneys in civil cases are not appealable." Memorandum of Defendant-Appellee concerning Appellate Jurisdiction at 10. We disagree. We conclude, with the Second Circuit, *see Interco Systems, Inc.* v. *Omni Corporate Services,* Docket Nos. 84-7008, 84-7012, slip op. at 3334 (2d Cir. Apr. 30, 1984), that *Flanagan* does not bar the immediate appeal of disqualification orders in civil cases. [25]

In civil cases there is no equivalent to the constitutional right to a speedy trial, which protects the interest of the defendant, strongly shared by the prosection and the society as a whole, in prompt adjudication, and which demands extraordinary limits on the collateral order doctrine. Thus, while courts have interpreted the collateral order doctrine extremely narrowly in criminal cases, they have permitted the immediate appeal of a variety of orders in civil cases.[41]

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[41] *See, e.g.,* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (order allocating expenses of identifying class members); McSurely v. McClellan, 697 F.2d 309, 315-16 (D.C. Cir. 1982) (order denying government officials absolute or qualified immunity); Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982) (order allocating costs of transporting plaintiff prisoners to court appearances); United States v. CBS, Inc., 666 F.2d 364 (9th Cir.), *cert. denied sub nom.* CBS, Inc. v. Columbia Pictures Indust., 457 U.S. 1118 (1982) (order denying motion of non-party witness for reimbursement of costs incurred in supplying subpoenaed documents); United States v. AT&T, 642 F.2d 1285, 1295-96 (D.C. Cir. 1980) (discovery order where compliance would allegedly violate work product privilege).

Not only is the constitutional requirement of speedy adjudication lacking in civil cases, but it has become apparent that the interests of the parties in proceeding expeditiously may diverge significantly. The tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary. *See, e.g., Board of Education of New York City* v. *Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979); *Williamsburg Wax Museum* v. *Historic Figures, Inc.,* 501 F. Supp. 326, 331 (D.D.C. 1980), *aff'd sub nom. National Souvenir Center, Inc.* v. *Historic Figures, Inc.,* Nos. 82-2329, *et al.,* slip op. at 27-28 (D.C. Cir. Feb. 10, 1984); Crocker, "The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest," 1979 Duke L.J. 1310; Comment, 45 U. Chi. L. Rev. 450 (1978). We are aware of no comparable phenomenon in criminal cases. The apparent interest of many civil litigants in delaying adjudication and their use of disqualification motions to help accomplish that end militate in favor of immediate review of orders granting such motions. To insulate from prompt review an erroneous order granting a motion to disqualify counsel would only raise the stakes in this dangerous game. Of course, these policy considerations do not alleviate the necessity for meeting the three-part test of *Cohen* and *Coopers-Lybrand;* they do, however, caution against an overly mechanical application of the *Flanagan* analysis in the context of a civil case. [26]

For an order to be immediately appealable under *Cohen,* it must first "conclusively determine the disputed question." The Court in *Flanagan* did not consider whether a disqualification order in a criminal case met this first criterion,

but in any event we reaffirm our conclusion in *Groper* that an order disqualifying counsel in a civil case "conclusively determine[s] the disputed question." *See Groper* v. *Taff*, 717 F.2d at 1417. *Cf. Firestone*, 449 U.S. at 375 (order denying disqualification conclusively determines question). The first part of the *Cohen/Coopers-Lybrand* test is therefore met. It is the Court's application of the second and third parts of the test in *Flanagan*—requiring that the order resolve an issue separate from the merits and that it be effectively unreviewable on appeal from a final judgment—that demands a deeper probe into the vitality of our holding in *Groper* v. *Taff*.

In *Flanagan*, the court was faced with the criminal defendants' assertion that the disqualification order was erroneous and violated their sixth amendment right to counsel. The Court expressed no view as to whether the constitutional right asserted was such that an erroneous disqualification of chosen counsel would result in reversal of a conviction automatically or only upon a showing of prejudice, but found at least one of the *Cohen* criteria unsatisfied in either case. If erroneous disqualification would result in automatic reversal, then the order was not "effectively unreviewable on appeal from a final judgment." 104 S.Ct. at 1056. If, on the other hand, the right would be violated only if prejudice resulted, then the validity of the order would not be independent of the issues tried and could only be evaluated after the trial was complete. *Id.* at 1056-57. In either case, then, one of the three requirements for immediate review would not be met.

We do not believe that the Court's "either/or" analysis in *Flanagan* can be appropriately applied in the civil con-[27] text. Unlike a criminal case, there is in a civil case no

constitutional right to counsel, the deprivation of which might result in automatic reversal of an adverse judgment. *Cf. Flanagan*, 104 S.Ct. at 1056. In that respect the *Flanagan* analysis is inapplicable. Only an erroneous disqualification combined with prejudice at trial could conceivably result in outright reversal of a civil judgment. Yet it would appear virtually impossible to show prejudice resulting from the absence of one counsel and the substitution of another. In a criminal case, a reviewing court could at least draw from the extensive body of law concerning effective assistance of counsel as a first step in determining whether substitute counsel's performance prejudiced the defense so as to require reversal.[42] In the civil context, however, the court would be without a starting point; because there is no sixth amendment right involved, there is no body of law to help a court evaluate whether a civil judgment should be overturned because of the quality of counsel's representation. The court would be relegated to the realm of after-the-fact speculation about whether the disqualified counsel would have devised a superior strategy, been more persuasive and appealing to the jury, more effectively cross-examined the opposing party's witnesses, and so on. We agree with the Fifth Circuit in *Duncan*, 646 F.2d at 1027, that the party attempting to obtain relief from an erroneous disqualification order after losing its case-in-chief would bear "an almost insurmountable burden."

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[42] Of course, we do not imply that, in case a showing of prejudice were necessary, a criminal defendant would have to show that the quality of substitute counsel's representation fell below the constitutionally minimum standard for effective assistance of counsel in criminal cases. We suggest only that appellate courts have considerable experience—not duplicated in civil cases—in evaluating whether shortcomings in the representation of a criminal defendant require reversal of a conviction.

The difficulty in showing prejudice would be particularly acuted if, for instance, plaintiffs were awarded a [28] judgment but the damages fell far below what they believe they were entitled to and what they believe their chosen counsel could have obtained. On the other hand, if the civil litigant were unable to retain adequate substitute counsel willing to take over in midstream, perhaps on a contingency fee basis, and were forced to dismiss the case voluntarily, it is not clear that any appeal would be available. In a criminal case, of course, the defendant has a constitutional right to effective assistance of counsel. Our concerns about the difficulty of demonstrating prejudice at the end of a case are only heightened by the fact that neither party cites a single case in which a civil judgment on the merits of a case was reversed because of an erroneous disqualification of counsel.[43] For all of these reasons, in a civil case more certainly than in a criminal case, the disqualification order would be, "as a practical matter, 'effectively unreviewable' on appeal from a final judgment on the merits," *Groper* v. *Taff*, 717 F.2d at 1417, and thus meets the third criterion of *Cohen*. We would have grave misgivings about denying immediate review of an order depriving civil litigants of counsel of their choice when it is clear that there can be no effective review at the end of the case.

Flanagan's analysis of the second *Cohen* requirement—that the issue be completely separate from the merits of the action—is similarly inapplicable. The Court in *Flanagan* determined that if the criminal defendants' rights would be violated by the disqualification order and their convic-

[43] We do not place too much significance on this fact, since most such orders have probably been appealed and reviewed before judgment, as in the case before us.

tions reversed only if the prejudice resulted at trial, then the order's "validity cannot be adequately reviewed until trial is complete," and would not be independent of the issues at trial. Defendant argues here that since a final judgment in its favor would be reversed only if plaintiffs could show that the disqualification order was erroneous *and* that it prejudiced their case, the "validity" [29] of this order would depend on the events at trial. We reject this argument for several reasons.

As we have already discussed, it would be virtually impossible for plaintiffs here to show that prejudice resulted at trial from an erroneous disqualification. On the other hand, the extensive record now before us presents an entirely adequate basis for determining whether the district court's order was proper. That determination does not depend on subsequent events at trial, does not require us to "make any step toward final disposition of the merits of the case and will not be merged in final judgment." *Cohen*, 337 U.S. at 546.

As best we can discern, the Supreme Court in *Flanagan* viewed as "invalid" only those erroneous disqualification orders that violate a defendant's sixth amendment right and thus require reversal of a conviction—whether because of presumptive or demonstrated prejudice. We must conclude that this unusual view of an order's "validity" is based on considerations that are peculiar to criminal cases and do not extend to the civil context. First, of course, the defendants' assertion of their sixth amendment right to counsel as the basis for their claim may have led the Court to equate the "validity" of a disqualification order with the absence of a sixth amendment violation. We cannot perform that equation in a civil case, since there is no equivalent consti-

tutional right at issue. Second, because of the particularly strong shared interests of the defendant, the state and the public in a speedy adjudication of guilt or innocence in criminal cases, the Court may have been especially unwilling to permit an interlocutory appeal merely to correct an erroneous ruling where the defendant might still be acquitted or, in case prejudice is not to be presumed but must be demonstrated, where no prejudice may result. The extraordinary concern for prompt adjudication in criminal cases thus provided additional reason in *Flanagan* to reject the usual distinction between error, which in circumstances like those before us can be determined independent of the [30] issues at trial, and prejudicial error requiring reversal of the judgment, which often cannot.

The court in *Flanagan* concluded that the question for which review was sought—whether the disqualification order violated the defendants' sixth amendment right to counsel—was either fully reviewable on completion of the trial or *not* fully reviewable *until* the completion of the trial. We conclude, in contrast, that the order appealed from in this civil case would be effectively unreviewable on appeal from a final judgment, and is properly reviewable on the record now before us.

One final consideration recommends the availability of immediate review in this case. Denying review in the case before us could irremediably prejudice not only the important interests of the clients in counsel of their choice but also the interest of the attorneys, who are parties to this appeal, in correcting what they claim is an erroneous finding of misconduct. The interest of counsel is an issue that was not even considered by the Court in *Flanagan*, where only

the defendants appealed. In any event, the basis for disqualification in *Flanagan* was simply the potential for conflict arising from counsel's representation of multiple defendants, *see* 104 S.Ct. at 1052-53, and not unethical conduct carrying with it great stigma and serious consequences for the attorney's professional reputation. In the event that plaintiffs were satisfied with the final verdict obtained by substitute counsel, the disqualified attorneys could be left with no means whatsoever of vindicating their own important interests on appeal from a final judgment. *See Duncan*, 646 F.2d at 1027. The interest of counsel in this case further bolsters our conclusion that a disqualification order in a civil case such as this is appealable under the collateral order doctrine. Even assuming that *Flanagan* would preclude immediate review of a disqualification order in a criminal case where counsel asserted its own interest in correcting a stigmatizing ruling, the reasonable assertion of those interests in a civil case, in which the collateral [31] order doctrine has been given somewhat broader application, provides additional grounds for affording immediate review of the disqualification order here.

For all of the above reasons, we conclude that *Flanagan* does not require us to depart from our recent decision in *Groper* v. *Taff*, 717 F.2d 1415, holding that orders disqualifying counsel in civil cases are immediately appealable under the collateral order exception to the final judgment rule. We proceed now to the merits of the disqualification order.

III. Issues

The district court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it. *See Groper* v. *Taff*, 717 F.2d at 1418. In reviewing

the court's decision, we are bound to accept the court's findings on disputed issues of fact unless they are clearly erroneous. The district court's conclusions of law, including its interpretation of the Code of Professional Responsiblity, and its application of the law to the facts are of course subject to appellate review for legal error.[44]

A. *Preliminary Observations*

Butler and Allis, who do not maintain offices in the District of Columbia, may enter an appearance before the district court not as a matter of right, but only with joint local counsel and with the permission of the district court to appear *pro hac vice*.[45] The district court deemed it "well settled that an attorney's admission *pro hac vice* in a case is the granting of a privilege and not a right." Opinion at 4, J.A. 236 (citing *In re Belli*, 371 F. Supp. 111 (D.D.C. 1974)). The court concluded on that basis [32] that there was "no strict test for determining whether a non-resident attorney's pro hac vice appearance in a case should be revoked during the course of a trial," and that "conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the denial or revocation of an attorney's pro hac vice appearance." Opinion at 4-5, J.A. 236-37.

We cannot agree with the judge's premise that *pro hac vice* counsel, once admitted, are subject to disqualification

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[44] Although the standard of review in *Groper*, in which the critical issue was factual, was abuse of discretion, we indicated that "a less deferential standard of review may be appropriate when . . . only a purely legal question is at issue." 717 F.2d at 1418 n.4.

[45] Local Rule 1-4(a)(1) of the U.S. Dist. Ct. for D.C.

more readily than are regularly admitted counsel. Nothing in the local rules of the district court [46] or in our cases suggests such a distinction. Our recent decision in *Groper* v. *Taff*, 717 F.2d 1415, involved the disqualification of counsel admitted *pro hac vice*. *Id.* at 1419. This fact was noted only parenthetically and in no way affected our resolution of the question of whether he had been properly disqualified. Like the Third Circuit, "we think it clear that limited to one case though the right of these attorneys to practice was, their standing with respect to this case was no different from that of any other regularly admitted local lawyer." *Cooper* v. *Hutchinson*, 184 F.2d 119, 123 (3d Cir. 1950).[47] Particularly in the federal courts of the District of Columbia, we think it would be unwise to introduce into litigation an unwar[33]ranted disadvantage against parties with non-resident counsel by subjecting that counsel more readily to removal. We thus conclude that the district court's premise that *pro hac vice* counsel may be disqualified more readily than regularly admitted counsel, was erroneous.

Appellees contend, however, that the conduct of Allis and Butler provides adequate grounds for disqualification under the standards applicable to regularly admitted attorneys. Local Rule 4-3(IV) of the District Court for the

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[46] Local Rule 4-3 (VII) provides that attorneys admitted *pro hac vice* are, like regularly admitted attorneys, subject to the disciplinary jurisdiction of the court. Rule 4-3 (IV), *see infra* p. 33, sets out general "Standards for Professional Conduct" for "any attorney admitted to practice before this court," and draws no distinction between local counsel and specially admitted counsel.

[47] We recognize that this is dictum; neither Cooper v. Hutchinson nor the Third Circuit's later case, Johnson v. Trueblood, 629 F.2d 302 (3d Cir. 1980), resolved the question of what substantive standards were to be applied in determining whether to revoke an attorney's *pro hac vice* appearance; each dealt instead with the procedural aspects of such an action.

District of Columbia provides for disciplinary action, after notice and hearing, against attorneys for "misconduct defined in these Rules, and for good cause shown." Misconduct is defined as "[a]cts or omissions . . . which violate the [District of Columbia] Code of Professional Responsibility . . . except as otherwise provided by specific Rules of this court." Our task, then, is not only to determine whether Allis and Butler have violated the Code of Professional Responsibility, but if so, whether there is good cause for the particular disciplinary action taken by the court.

The two episodes of alleged misconduct before us in this case are fundamentally different from others in which we have previously upheld disqualification. We have approved or even on occasion mandated disqualification where a conflict of interest—potential or actual—between current clients undermined the court's confidence in counsel's ability to serve each client with undivided loyalty, *see, e.g., Yablonski* v. *United Mine Workers,* 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); *Yablonski* v. *UMW,* 448 F.2d 1175 (D.C. Cir. 1971); where a lawyer would likely be called as a witness in the main case, thus compromising his effectiveness as an advocate, *Groper* v. *Taff,* 717 F.2d 1415, 1418 (D.C. Cir. 1983); or where counsel's prior work on the same or related matters as a government official may create an appearance of impropriety in contraven[34]tion of DR 9-101(B). *Kessenich* v. *Commodity Futures Trading Commission,* 684 F.2d 88, 98 (D.C. Cir. 1982).[48]

[48] Defense counsel relies on Laughlin v. Eicher, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied,* 325 U.S. 866 (1945) and Viereck v. United States, 130 F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds,* 318 U.S. 236 (1943), for the proposition that this court has not heretofore imposed strick limitations on the power of the district court to disqualify counsel. *Laughlin* concerned the disqualification of defense counsel in a sedition trial after counsel filed an impeachment petition against the judge and made statements in court and in the petition that this court characterized as "highly derogatory," "fantastic," and "a public profession of contempt for [the judge's] character." 145 F.2d at 702. The case is, in short, highly exceptional and does not affect our conclusion here that disqualification is *rarely* warranted in cases not falling into the pattern delineated in text. In *Viereck,* the district court "ejected" defense counsel summarily on the basis of counsel's statement, after a ruling foreclosing certain testimony, that the court was "biased in favor of the Government and prejudiced against this defendant." 130 F.2d at 961. Our decision over 40 years ago approving the court's summary disqualification as "perfectly proper" is of dubious authority, at least in light of current case law concerning the procedural rights of attorneys. *See, e.g.,* Johnson v. Trueblood, 629 F.2d 302 (3d Cir. 1980).

Similarly, the Second Circuit in surveying its own cases, concluded that

> "with rare exceptions, disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage.

Board of Education of New York City v. *Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979) (citations and footnotes [35] omitted). Although our own cases, fewer in number, cannot be so neatly categorized, they are basically consistent with the Second Circuit's admonition that "unless an attor-

ney's conduct tends to 'taint the underlying trial,' by disturbing the balance of the presentations in one of the two ways indicated above, courts should be quite hesitant to disqualify an attorney." *Id.* at 1246 (citation omitted). Indeed, we see much wisdom in the view expressed by Judge Mansfield in concurrence:

> The attorney is the client's choice. Disqualification is wasteful and time-consuming. Only where the attorney's unprofessional conduct may affect the outcome of the case is there any necessity to nip it in the bud. Otherwise conventional disciplinary machinery should be used and, if this is inadequate, the organized bar must assume the burden of making it effective as a deterrent.

Id. at 1247-48.

We agree that disqualification is warranted only rarely in cases where there is neither a serious question as to counsel's ability to act as a zealous and effective advocate for the client, *see, e.g., Groper* v. *Taff*, 717 F.2d at 1418; *Yablonski* v. *UMW*, 448 F.2d 1175, nor a substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party, *cf. Williamsburg Wax Museum*, 501 F. Supp. 326, or prior responsibility as a government official, *see Kessenich*, 684 F.2d 88. Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available to deal with ethical improprieties by counsel.[49] With [36] these general consid-

[49] For example, the court may issue a formal reprimand or, in more serious cases, a contempt citation either during or after the proceedings; it may also refer possible ethical improprieties to the disciplinary bodies of the local bar or, in the case of attorneys admitted *pro hac vice*, to the bar of the attorney's home state.

erations in mind, we proceed to an analysis of the alleged misconduct by Allis and Butler.

B. *The Episode Involving Allis*

The district court found that Allis' purpose in visiting Janowski was to obtain a "retraction" of a prior statement to defense counsel that Mrs. Koller had not taken Bendectin when she claimed she did. The court recognized that Allis' conduct was at least arguably "in pursuit of protecting the interests of his clients," but concluded that it was inconsistent with a countervailing duty "to investigate whether Cynthia Koller was committing a fraud upon the court." The court cited several provisions of the Code of Professional Responsibility ("Code")—DR 2-110(B)(1) and DR 7-102(A)(3), (A)(6), and (B)(1)—without clearly finding Allis in violation of any of them.

1. *Standards of Conduct*

Counsel in both criminal and civil cases frequently face situations in which there is some evidence tending to cast doubt upon the credibility of the client or the validity of the claim. Yet the adversary system is based on the premise that the truth is best ascertained in such instances through the zealous and competent presentation by each side of its strongest case. The fundamental obligation of an attorney to his client—the bedrock principle of the adversary system—does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud. The attorney's duty

to the client is, of course, not without limits. In the familiar words of Canon 7 of the Code, "[T]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law*." EC 7-1 (emphasis added). The legal profession continually struggles to define the point at which the attorney's basic loyalty to the client must [37] give way, for that point is very much at the heart of the adversary system.

The Disciplinary Rules of the Code cited by the district court set out standards that are designed to guide attorneys through the numerous and difficult ethical dilemmas that an advocate confronts. Thus, DR 7-102(a)(3) states that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is *required by law* to reveal" (emphasis added). According to DR 7-102(a)(6), "a lawyer shall not . . . [p]articipate in the creation of evidence when *he knows or it is obvious* that the evidence is false" (emphasis added). DR 7-102(B)(1) provides that "[a] lawyer who receives information *clearly establishing* that . . . [h]is client has, in the course of the representation, prepetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same" (emphasis added). Furthermore, a lawyer is required to withdraw from representation of a client if "[*h*]*e knows or it is obvious* that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation merely for the purpose of harassing or maliciously injuring any person." DR 2-110(B)(1) (emphasis added).

The Disciplinary Rules require objective and informed recognition by an attorney that specific evidence or a client's claims are fraudulent before imposing on the attorney an affirmative obligation to take actions that may be contrary

to the interests of the client. An attorney faced with a potential conflict between the duty to the client and the duty not to perpetrate a fraud on the tribunal is entitled to rely on the standards of the Code of Professional Responsibility and should not be disqualified for conduct that falls within the general ambit of those provisions but does not violate the Disciplinary Rules. To permit disqualification for purported misconduct that falls short of a violation of these standards might well penalize conduct that could reasonably be deemed mandatory in fulfilling the duty to pursue zeal-[38]ously the interests of the client. The local rules of the district court, which define attorney misconduct primarily in terms of the Code, thus embody a conclusion that fairness and the logic of the adversary system in any event compel.

2. *The Propriety of Allis' Conduct*

It appears that the district court, perhaps because of its erroneous premise that *pro hac vice* counsel could be more readily disqualified than regularly admitted counsel, strayed from the strict standards derived from the Code. First, the court began its discussion by stating as a general rule that "conduct which may fall short of a violation of a Disciplinary Rule of [the Code]" may warrant revocation of a *pro hac vice* appearance. Consistent with this premise, nothing in the opinion finds Allis guilty of a violation of the Code, but rather postulates on the basis of several disciplinary rules a general duty to initiate or foster a "true investigation" and thereby "to assist in preventing any acts of fraud upon the court." The court found Allis' effort "to obtain a retraction" from Janowski inconsistent with that general duty. Yet the court made no explicit or implicit

finding that Allis did not or could not reasonably believe in the good faith of his client's claim—in particular Mrs. Koller's assertion that she took Bendectin in the first trimester—or in the truth of the "retraction" he obtained from Janowski. The court did not even incorporate or refer to the language of its preliminary Order to Show Cause, suggesting that Allis sought to obtain a retraction "without regard for [its] truth." [50] [39]

We certainly cannot read the court's opinion as finding that Allis "knew or it was obvious" that the statement was false or that the Kollers' claim was in bad faith, or that Allis had evidence "clearly establishing" that Mrs. Koller had perpetrated a fraud on the court. In the absence of any finding—or indeed any evidence—that Allis knew or that it was obvious that Janowski's claims to him were false or his clients' case fraudulent, we can find no impropriety in his visit to Janowski for the purpose of obtaining a "retraction" of any damaging and, according to Allis' belief, false statements made to the defense.[51]

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[50] Three days of hearings and eight months of deliberation intervened between the Order to Show Cause and the final decision. We therefore decline to read the allegations of the Order to Show Cause as findings of fact by the district court, as the defendant appears to urge us to do. *See, e.g.*, Brief for Appellee at 17, 43, 44.

[51] The defendant argues that Allis' conduct is at least as blameworthy as the conduct found to to warrant revocation of *pro hac vice* status in United States v. Madsen, 148 F. Supp. 625 (D. Alaska 1957). In *Madsen*, the defense attorney in a murder case had trespassed on police property, entered the car in which the victim was shot, and physically altered the appearance of the bullet hole. *Id.* at 628. Defendant's attempt to analogize Allis' conduct to that in *Madsen* must be characterized as advocacy in the extreme, and only highlights the equivocal nature of the charges against Allis. Other cases relied on by the defendant involve lawyers bribing or coercing witnesses not to testify or to testify falsely. *See, e.g.*,

Nor can we condemn several specific aspects of Allis' conduct found objectionable by the district court. According to the district court, Allis testified "under oath that he had no intention of informing the court of the results of his 'investigation'." Opinion at 6-7, J.A. 238-39. Allis actually testified that at the time he prepared and obtained a statement from Janowski, he had no fixed idea of how he would use it.[52] But we have found no basis in any event for the district court's implicit assumption that Allis had a duty, immediately upon discovering that his secretary may have cast aspersions on the good faith of his client's case, to bring this matter to the court's atten-[40] tion. Unless "he [knew] or it [was] obvious" that the Kollers' claim was fraudulent, Allis' primary duty was to investigate on behalf of his clients.

The court also criticized "Allis' failure to read the prepared statement line-by-line to Janowski to insure that she understood the contents of the statement before signing." Opinion at 7, J.A. 239. But in the light of Allis' uncontradicted testimony that the substance of the statement simply put in writing what Janowski had repeated to Allis several times throughout the day and had indeed restated in the very conversation during which she read and signed the statement, we can find no fatal shortcoming in this aspect of Allis' conduct.

Furthermore, we cannot agree with the district court's conclusion that Allis acted improperly in obtaining the statement "irrespective of the erratic behavior displayed

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United States v. Fayer, 523 F.2d 661 (2d Cir. 1975); People v. Kennelly, 648 P.2d 1065, 1066 (Colo. 1982). No such conduct was found by the district court here.

[52] Hearing of June 30, 1983 (Allis), J.A. 946-47, 966-67.

by Janowski during his visit on December 27." There was indeed ample testimony that Janowski was a flamboyant personality, that Allis believed she might have been emotionally unstable, and that, according to evidence later adduced, she had a history of mental instability and other problems. Yet we cannot find anything in Janowski's behavior that day that should have made it clear to Allis either that she did not understand what she was saying about Barnes' conduct and about the *Koller* case, or that what she was saying was untrue. Nor do we understand the court's cryptic reference to Janowski's "erratic behavior" as a finding to the contrary. Under these circumstances, Allis cannot be said to have acted improperly in getting a statement from Janowski affirming the gist of what she had already twice reported to him orally.

Counsel for the defendant does not even argue that Allis knew or that it was obvious that Janowski's critical claim—that she was under pressure from the defendant to sign a false statement that Koller had admitted not taking Bendectin during the first trimester—was false or [41] that the case was a fraud. In oral argument defense counsel conceded that, given what Allis knew on December 27, it was proper, and perhaps even required by his duty to the Kollers, for him to visit Janowski and probably to take some kind of statement. Counsel claims, however, that Allis crossed the permissible line by including two "self-serving" statements that went beyond what Janowski had already told him and that were untrue: the statements that "my [*i.e.*, Janowski's] mind is free and clear," and that Janowski was receiving no remuneration in exchange for the statement.

Although the court did not mention the "free and clear" passage, the district court's criticism of "Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski" could arguably be read as implying a finding that the "free and clear" passage was inaccurate. Counsel for the defendant argues that the statement that "my mind is free and clear" was an "indisputable falsehood." Brief for Appellee at 45. We do not, however, view it thus in the confusing context of that eventful day. The statement appears to us to resemble the simple affirmation of mental clarity routinely inserted in wills, affidavits and other documents, and cannot be said to be palpably false or misleading unless Allis "knew or it was obvious" that Janowski did not understand what she was saying, that she signed the statement under duress, or that other assertions in the substance of the statement were untrue. The district court's opinion does not come close to making any such finding, and the evidence supports Allis' characterization of Janowski's behavior as, at most, "almost inappropriately calm," relaxed and chatty that evening.[53]

The defendant points to another specific passage from the Janowski statement as an "indisputable falsehood": the statement that "I have been promised no remunera-[42]tion of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else." The defendant argues that this statement is false because "[a]fter the statement was signed (but before it was transmitted to the District Court), Allis agreed that a typewriter would be delivered to Ms. Jan-

[53] Hearing of Mar. 15, 1983 (Allis), J.A. 809-10.

owski's apartment so that she could stay on the Butler firm's payroll without coming into the office." In addition, defendant points to an arrangement by which Janowski's roommate "would pick up salary and vacation checks for her on Friday, December 31, 1982." Brief for Appellee at 45.

The district court, however, made no reference whatsoever in its opinion to the statement about "remuneration," nor did it make any other "finding" that could be interpreted as support for the defendant's argument on this point. As of December 27, 1982, Janowski was still an employee of the Butler firm and had recently given birth to a premature baby which was occuping much of her time. Furthermore, it is undisputed that she told Allis that she was under pressure from defendant to sign a false statement that her employer's case was a fraud. We therefore reject the defendant's contention that keeping her on the payroll temporarily in order to accommodate her role as an employee with the emotional pressures of her personal situation, and even paying her wages and fringes that were due to her for past service,[54] con-[43]stituted "remuneration" for making the December 27 statement. Indeed, two expert witnesses on legal ethics testified that, given the growing suspicion that Janowski

[54] In arguing that the paycheck was "remuneration" beyond what was due to Janowski, defense counsel makes much of the fact that she had performed virtually no work during the pay period. Not only did the pay period extend over the Christmas and New Year's holidays, but there is also uncontradicted testimony that the firm was rather liberal in permitting employees personal time off—time not counted against vacation pay—while continuing to pay their regular salary. Janowski herself had been given several days off months earlier when her brother was injuried. Hearing of June 30, 1983 (Allis), J.A. 949-50.

may have actually contacted opposing counsel, though perhaps only on Barnes' suggestion, Allis "probably hit on the ideal way" to handle the situation.[55] The arrangement legitimately kept her on the payroll, at least temporarily, while keeping her out of the office. We cannot accept defense counsel's condemnation of Allis' failure to fire Janowski immediately before even sorting out what had happened.

Finally, we do not find any impropriety in Allis' recording of the December 27 conversation. There is authority for the proposition that surreptitious recording generally is unethical,[56] and this court does not sanction the practice. Counsel, the client and the witness are ordinarily best protected if counsel advises the witness that the conversation is being recorded and obtains permission for the use of that recording. While Allis did not follow that procedure in this case, given the expert testimony that the use of a secret recording was proper under the peculiar circumstances Allis faced,[57] and given the questionable credibility of the individual being recorded, Allis' actions in taping his conversation with Janowski can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to "thwart a true investigation." On the whole, we con-

[55] Hearing of June 30, 1983 (Lumbard), J.A. 1039. *See also id.* (Austern), J.A. 996.

[56] *See, e.g.*, ABA Comm'n on Ethics and Professional Responsibility, Formal Op. 337 (1974); N.Y. Bar Ass'n Comm. on Professional Ethics, Op. 328 (1974). These and other bar opinions on the ethics of surreptitious recording appear at J.A. 248-68.

[57] *See* Hearing of June 30, 1983 (Austern), J.A. 1017-18; *id.* (Lumbard), J.A. 1030-32.

clude that Allis' actions throughout the Janowski episode [44] did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs.[58]

3. *The Nature of the Proceedings*

We also feel compelled to express our misgivings with the scope of the district court's inquiry into Allis' conduct; it was at once too broad and too narrow. At the outset, the court interpreted the Butler firm's limited waiver of the attorney-client privilege as to any conversations between Janowski and Mrs. Koller to extend to any discussions concerning when Mrs. Koller took Bendectin, including discussions within the firm, between the firm and other plaintiffs' counsel, and between the Kollers and their lawyers. As a result, we and the defendant are privy to the minute details of innumerable strategy meetings, telephone calls, and other conversations concerning one of the two key factual issues in the *Koller* case. While the court stated that it would "not tolerate a fishing expedition into the strategies of plaintiffs' attorneys in this litigation," Memorandum Opinion of Jan. 19, 1983, J.A. 139, the early stages of the inquiry seem to have come close to just that.

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[58] We express no view as to the proper resolution of any problems that could arise in future proceedings if Janowski appears as a witness for the defendant and plaintiffs seek to impeach her testimony. *Cf.* Rosen v. NLRB, No. 83-1226, slip op. at 18-22 (D.C. Cir. May 18, 1984) (where testimony as to attorney's conduct at prior meeting was critical evidence undermining client's position, attorney should have withdrawn to testify as to meeting). Although we do not foreclose the pretrial inquiry that the concurring judge would mandate neither do we believe it is our function to take up this issue *sua sponte*, speculate on possible future scenerios in which the problem could arise, and instruct the district court as to how to deal with it.

The court's primary justification for permitting this massive intrusion into the attorney-client and work-product privileges was the exception for fraud. *Id.*, J.A. 141. Even if this exception could support such a sweeping abrogation of the privileges at issue, it should not have been applied in this case without first ascertaining whether there was any credible evidence that Mrs. Koller had indeed admitted to Janowski not taking Bendectin [45] during the critical period. Without credible evidence of such a conversation—the only new "evidence" before the court—there would seem to be no basis for the extraordinarily detailed inquiry launched in January into the plaintiffs' evidence on this crucial issue in the case-in-chief. Yet the court stated in its January 19 ruling only that it could not find Janowski's charge to be "frivolous or manufactured at this time." *Id.* For the purpose of the evidentiary hearings into the episode, the court viewed as irrelevant the question of whether such a conversation ever took place, and the credibility of Janowski in general.[59] Indeed, at this point not even defense counsel is willing to endorse Janowski's credibility.

The extensive and detailed nature of the court's inquiry into possible improprieties of plaintiffs' counsel is especially confounding in light of the court's refusal to entertain any substantial inquiry into possible improprieties by defense counsel. This limitation on the inquiry cannot be explained

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[59] It is not clear to us why it was necessary, once the court had concluded that Janowski's testimony as to any conversation with Mrs. Koller was simply evidence for the jury to consider, *see supra* note 29, to hold immediate evidentiary hearings on the propriety of Allis' conduct several months earlier. These proceedings and the court's subsequent deliberations appear to have been primarily responsible for over a year's delay in the trial of this action.

simply by the pendency of a defense motion to disqualify plaintiffs' counsel, since the court stressed that the inquiry was as much on the court's own initiative as at the behest of the defense.[60]

There was evidence, some undisputed, that defense counsel had engaged in discussions about a case with a confidential secretary for opposing counsel without [46] her employer's knowledge, had made *ex parte* contact with the court's law clerk on December 23, touching on at least some matters of substance,[61] had on its own obtained "independent counsel" for Janowski,[62] and was paying substantial sums of money to provide Janowski not only with counsel, but also with a comfortable apartment and other financial needs for her and her child. We are certainly in no position to ascertain whether any of these activities constituted misconduct by defense counsel. But we are left with some bewilderment over the court's one-sided approach to a peculiar episode that drew counsel on both sides into very murky waters.

C. *The Episode Involving Butler*

The district court found that Butler's "release of the DERs to the media was calculated to prejudice the de-

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[60] *See* Hearing of Mar. 27, 1983, J.A. 639-2.

[61] *See supra* pp. 9-10. Defense counsel asserts that the December 23 telephone call was solely for the purpose of attempting to set up a meeting with the court as soon as possible.

[62] Defense counsel contends that Schuck is a reputable attorney not personally known to them and that he has complete independence in his representation of Janowski. Plaintiffs dispute Schuck's independence, in light of the source of his fee and his firm's representation of other drug companies involved in litigation, including birth defect litigation, in which the Butler firm is opposing counsel. Affidavit of Butler, Jan. 5, 1983, J.A. 283.

fendant's case and circumvent the Court's prior rulings," citing in particular "Butler's refusal of the Court's suggestion that he explain his actions during the hearings." Opinion at 8, J.A. 240. We read the court's opinion not as a *per se* condemnation of Butler's communication to the press of information relevant to the case; rather the court appears to have been primarily concerned with the peculiar timing and placement of the release of information so as to maximize the likelihood of potential jurors seeing it. Nevertheless, we cannot uphold the court's order disqualifying Butler for his actions. [47]

Initially, we have some question as to the basis for the court's finding that Butler's intent was to "prejudice the defendant's case" and circumvent the court's evidentiary rulings. The court heard no live testimony on this issue; in particular it heard no testimony contradicting a plausible explanation contained in Butler's affidavit for the timing of the release—that he had not received the parents' authorizations to release the information until January. We do not believe that the court could reasonably conclude from Butler's failure to testify voluntarily that he was lying in his affidavits as to his motivation. In light of this explanation, together with Butler's amply demonstrated concern over the safety of Bendectin, the peculiar timing of Butler's release of information does not provide unambiguous support for the court's finding of bad intent.

In any event, the circumstantial evidence of Butler's intent is not dispositive; we must also look at what Butler did. The court's order treats Butler's disclosure of information ruled inadmissible in a series of routine pretrial evidentiary rulings as the equivalent of his violation of a direct prohibition on dissemination of information to the public. If

Butler had released the information in the face of a protective order barring public disclosure of the DERs, we would be facing a more acute conflict between the integrity of the court's orders and the constitutional issues raised by direct restraints on the free flow of information about matters of public concern.[63] But the [48] court issued no such order. We cannot view Butler's release to the public of information ruled inadmissible at trial as anywhere near equivalent to a violation of a court order prohibiting such conduct.

Nor is Butler's conduct covered by traditional bans against bringing inadmissible evidence directly to the attention of the jury, either inside or outside the courtroom. Thus, provisions proscribing the reference at trial to material ruled inadmissible, *see* DR 7-108(A), (B)(1), and those prohibiting direct extrajudicial communication with jurors, *see* DR 7-106(C)(1), (C)(7), are clearly inapt. Defendant invokes a "fundamental principle familiar to

[63] *See* CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (vacating order prohibiting counsel, parties, friends and relatives from discussing case with press). We note that protective orders will more readily pass constitutional muster in the very distinct context of information obtained through civil discovery. *See* Seattle Times Co. v. Rheinhart, —— U.S. ——, 52 U.S.L.W. 4612 (May 21, 1984); *cf.* In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) (upholding order found to be "least restrictive means" possible under extreme circumstances of case). As far as we can tell, none of the information released by Butler was obtained through discovery.

The public importance of many issues involved in civil litigation is frequently cited as a reason for limiting the application of restrictions on press commentary by attorneys in civil cases. *See, e.g.*, In re Halkin, 598 F.2d 176, 187 (D.C. Cir. 1979); Hirschkop v. Sneed, 594 F.2d 356, 373 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

every trial lawyer [that] when the Court has ruled that evidence is inadmissible, counsel has a legal and ethical obligation to refrain from circumventing the Court's ruling by using circuitous means to place the evidence before the jury." *See* Brief for Appellee at 59. But the cases cited in support of the principle involve reference in final arguments to inadmissible evidence, and are thus similarly inapt.[64]

The defendant argues that Butler has violated the section of the District of Columbia Code of Professional Responsibility that deals directly with press comments by counsel in civil matters, a provision not, however, mentioned by the court. The District of Columbia Court of Appeals on February 14, 1975, amended the Code to [49] eliminate the direct prohibitions on extrajudicial statements contained in DR 7-107(G) and (H). The court instead substituted Canon 20 of the American Bar Association Canons of Professional Ethics, which reads as follows:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond question from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

The deliberate substitution of this general and largely precatory language for the detailed restrictions of DR 7-107

[64] *See* Garris v. United States, 390 F.2d 862, 865 (D.C. Cir. 1968); Reichert v. United States, 359 F.2d 278, 282 (D.C. Cir. 1966).

(G) and (H) of the Code may well reflect serious reservations about the wisdom and even the constitutionality of the latter.[65] The Legal Ethics Committee of the District of Columbia Bar has emphasized with respect to the current D.C. version of DR 7-107(H) that it "would hesitate to interpret the Code of Professional Responsibility or the Canons of Profesional Ethics in such a way as to thwart the communication of accurate factual information regarding legal proceedings to the press in the absence of *a substantial threat to the due administration of justice.*" Formal Op. 8 (1975) (emphasis added).[66] [50]

The Legal Ethics Committee's opinion highlights a critical element in the proper interpretation of the Code's admonition against press statements by lawyers about civil litigation—an element that is missing in this case. The court found no "substantial threat to the due administration of justice," but based its order entirely on Butler's purported intent to circumvent its ruling and prejudice the defendant's case by releasing the information. In this case, the resulting article was far from inflammatory, and gave substantial space to those, including defendant, who disputed Butler's assessmennt of the teratogenic qualities of Bendectin. Indeed, the article quotes defendant's position on the com-

[65] Two courts of appeal have struck down the ABA rules prohibiting public comment by lawyers in civil cases as unconstitutional restraints on attorney speech. *See* Hirschkop v. Sneed, 594 F.2d at 373; Chicago Counsel of Lawyers v. Bauer, 522 F.2d at 257-59.

[66] The Fourth Circuit in *Hirschkop*, in reviewing the background of ABA DR 7-107, had occasion to comment on its predecessor, ABA Canon 20, the text of which has been adopted as the current D.C. version of DR 7-107(H). The court commented as to Canon 20 that "as long as the standards were so general and unspecific, and in the presence of First Amendment rights, punishment should be meted out only to the most flagrant offenders." 594 F.2d at 365.

pletely independent issue of when Mrs. Koller took Bendectin—an issue of no public importance outside of the *Koller* case itself. The court properly observed that the conduct of Mintz was not before it,[67] but the focus on Butler's conduct alone should not have precluded any inquiry into the actual effect of his conduct on the likelihood of a fair trial. Apart from the balanced nature of the article, the prospect of prejudice was further diminished by the fact that the information was released before jurors were assigned to a particular case and thus alert[ed] to the nature of the issues they would decide.[68] We have no basis for believing that voir dire, a process designed in part to protect against prejudicial publicity, would be inadequate to discover and remove any jurors influenced by the Mintz article.[69] [51]

The defendant relies heavily on *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied sub nom. Matzner* v. *New Jersey*, 393 U.S. 924 (1968), in which the court revoked the *pro hac vice* appearance of criminal defense counsel, F. Lee Bailey. Whether or not we were to find *Kavanaugh* to be persuasive authority, its facts are radically different from those before us. In that case, Bailey sent out over 150 letters to public officials, not surprisingly leaked to the press, protesting the exclusion of lie detector evidence

[67] Hearing of Feb. 17, 1983, J.A. 615-18.

[68] This would be a different case if Butler had released the information in the middle of trial when jurors would be highly alert to any articles about Bendectin and birth defects.

[69] Several courts have pointed out that the danger of jury prejudice due to publicity is much less in civil than in criminal cases and can generally be alleviated without broad prohibitions on press commentary by lawyers. *See, e.g.*, In re Halkin, 598 F.2d at 192-93; Hirschkop v. Sneed, 594 F.2d at 373; Chicago Council of Lawyers v. Bauer, 522 F.2d at 257-58.

favorable to his client, attacking as utterly corrupt the entire conduct of the proceeding, and calling for executive intervention to halt the prosecution. Even in the face of such extreme statements by counsel, the court in *Kavanaugh*, unlike the district court here, revoked Bailey's appearance only after reluctantly concluding that there was no evidence that "Bailey would stay in bounds" in the future, and that subsequent disciplinary proceedings would be inadequate to protect the integrity of the judicial process. 243 A.2d at 231.

This case is very different. While Butler's decision to release the DERs to the press precisely when he did is not to be applauded, we do not believe that he could properly be found to have violated the language of the D.C. Code of Professional Responsibility. At least in the absence of clear evidence of a substantial threat to a fair trial for defendants, we cannot approve his disqualification, with the attendant prejudice to his clients, on the basis of this episode.

IV. Conclusion

We conclude that the district court applied an erroneous legal standard in evaluating whether Allis and Butler had engaged in misconduct warranting revocation of [52] their *pro hac vice* appearances. Viewed under the appropriate standards, the conduct of neither Allis nor Butler justifies the court's order revoking their appearances and disqualifying their law firm. We therefore reverse the decision of the district court and remand for reinstatement of the appearances of Allis and Butler on behalf of plaintiffs.

The plaintiffs have requested that we direct the district court to assign this case to another judge for future proceedings. *See* Brief for Appellants at 57. We recognize that these disqualification proceedings, culminating in what we have determined to be erroneous findings of misconduct against plaintiffs' counsel, have sorely tried the relationship between the court and plaintiffs' counsel. If the district court judge believes that it will be difficult after these events for her to act with complete impartiality in future proceedings vis-a-vis Allis and Butler, we are confident that she will recuse herself. Otherwise we decline to prejudge her ability to preside with equanimity over a fair trial on the merits of the Kollers' claims. We add only a few words about the disciplinary proceedings reviewed here.

In December, 1982, when this episode began, trial was scheduled to begin within weeks. Trial has still not begun. In the course of these disqualification proceedings, the court and counsel have probed the inner workings of the plaintiffs' counsel's law firms, shattering counsel's work-product privilege and plaintiffs' attorney-client privilege. The inquiry shifted focus several times, appearing at one point to be an investigation of the plaintiffs and of one of the core issues in their lawsuit, at another time of the bizarre activities and motives of the "double agent" informer, and finally of plaintiffs' counsel.

The disruption and delay of proceedings on the merits, such as we have seen in this case, are unhappily foreseeable byproducts of the injudicious use of disqualification motions by opposing counsel. We fear the intrusive [53] potential of such motions would be exacerbated were orders disqualifying counsel not immediately appealable. In complex, costly product liability cases of this type, the plaintiff may have no realistic or comparable alternative to current counsel; counsel are not fungible. To the degree that the credibility

of potential witnesses such as was involved in this case can and will be tested in the course of the case in chief, there is little justification for a protracted preview of the evidence through disqualification proceedings. As for questionable activities on the part of trial counsel, at least where those activities do not clearly violate a disciplinary rule and taint future proceedings, they should be remediable by admonitions, protective orders, or even, if necessary, by post-trial contempt without needlessly delaying proceedings on the merits and depriving a party of its chosen counsel.[70] We hope that the profoundly disturbing episode chronicled in this case serves to make trial courts and counsel aware of the importance of not allowing dubious and exaggerated attacks on counsel to derail civil proceedings.

Reversed and remanded.

[70] As we explain *supra* pp. 33-35, in some situations—especially conflicts of interest or likely appearance by counsel as a witness—continued representation by counsel may taint future proceedings; in those cases a pretrial inquiry and possibly disqualification may be necessary.

Concurring Opinion in the Court of Appeals

[1]

RICHEY, J. (concurring): With some reservation, I reluctantly concur in Judge Wald's opinion but am now writing to clarify my differences with the majority without in any way intending to reflect adversely upon my two colleagues or the sincerity of their views. I am just compelled to express my views separately on two issues of crucial importance in this and future cases. I address them *seriatim*.

THE TRIAL JUDGE SHOULD BE DIRECTED TO CONDUCT A PROMPT HEARING PRIOR TO TRIAL BECAUSE IT MAY BE NECESSARY FOR COUNSEL TO APPEAR AS A WITNESS

One of the crucial factual issues to be decided at the trial of this case will be whether Mrs. Koller actually took Bendectin during the critical period; that is, during the first trimester of her pregnancy. The importance of this issue is evidenced by the zealous efforts of counsel for all parties to obtain statements and/or retractions from Janowski, who claimed that Koller had admitted not taking the drug during the critical period. Unfortunately, however, zealous efforts can often lead to the possibility that a lawyer will be called as a witness. In this case, given the active role that counsel for both sides have taken in gaining statements from Janowski, and given the apparent inconsistency of some of those statements, there is a strong possibility that a lawyer from either side, or both, will be called to testify. The lawyers may have to testify concerning their actions in communicating with Janowski or other matters, or even to impeach her credibility. When the potential for unfair surprise and prejudice to either side is so great, it is the

responsibility of this Court to *sua sponte* raise the issue and give the trial court specific direction on how to resolve the problem.

The public interest demands an efficient use of judicial resources towards the "just, speedy and inexpensive" [2] remedy spoken for in Rule 1 of the Federal Rules of Civil Procedure. Towards that end, "courts should *sua sponte* raise ethical problems involving danger to a just, speedy and inexpensive remedy, even if the parties do not." *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 711-12 (6th Cir. 1982); *Moyer v. 1300 Nineteenth Street Corp.*, —— F. Supp. —— (D.D.C. May 14, 1984). Here the danger is a large probability. Defense counsel may choose to call Allis to try and show that he obtained the retraction from Janowski in a misleading or unfair manner. Plaintiff's counsel may decide to call a member of the defense law firm to try and show that Janowski's original claim that Koller was not telling the truth, was induced by financial or other incentives or threats. In addition, there exists the potential that a lawyer on either side will need to be called to support their own client's position. For example, Allis may need to testify concerning what Janowski told him during his visit to obtain the retraction.

Attorneys appearing before this Court and the District Court are governed by the Code of Professional Responsibility adopted by the District of Columbia Court of Appeals. Local Rule 4-3(IV)(b). DR 5-102(A) provides that a "lawyer . . . shall withdraw from the conduct of the trial and his firm, if any, shall not continue in the representation in the trial" if he knows or it is obvious that he ought to be called as a witness on his client's behalf. In addition, DR 5-102(B) provides that when "a lawyer learns or it

is obvious that he . . . may be called as a witness other than on behalf of his client" he may continue representation only until it is apparent that his testimony may be prejudicial to his client. Ethical Consideration 5-9 notes that "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state the facts objectively." In such situations where the lawyer is called to testify, as this Court has recognized, the "case [3] would be presented through the testimony of an obviously interested witness who is subject to impeachment on that account . . .". *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983). As such, the lawyer is put "in the unseemly position of arguing his own credibility". *Id.* When an attorney is forced to argue his own credibility, the effects are disastrous. Such testimony has high prejudicial impact which is unlikely to be outweighed by its probative value. Fed. R. Evid. 403. The magnitude of the problem is ably discussed in *General Mill Supply Co. v. SCA Supply Services, Inc.*, 697 F.2d 704, 712 (6th Cir. 1982):

> The experience of the bar and its collective voice in the ABA Canons demands the separation of the roles of advocate and witness. Experience shows that one who combines both roles is not likely to be, as an officer of the court, helpful to the court. There is always danger that when he speaks he will forget whether he speaks as advocate or counsel, to the likely confusion of proceedings, as well as their embitterment. Experience teaches that embitterment between counsel does not conduce to just and speedy proceedings. Such embitterment is likely to occur when one counsel undertakes to impeach the credibility of opposing counsel in his capacity of witness.

See also Moyer v. *1330 Nineteenth Street Corp.*, —— F. Supp. —— (D.D.C. May 14, 1984).

Although the parties have not raised this issue in their pleadings or in oral argument, as previously stated, in such a case where the potential for conflict is so strong, I believe that the duty of this Court is no less than the trial judge to see that the matter is ventilated at the earliest practicable moment *prior to trial.* While it is not the role of this Court at this stage to make factual or legal determinations on this issue, I would advocate the exercise of this Court's inherent power as supervisor of the administration of justice in remanding the case to give specific instructions to hold a pre-trial hearing on [4] this issue. Counsel for both sides have peculiar knowledge that relates to crucial facts in dispute in this case. In order to avoid the possibility of a mistrial and a waste of judicial resources that could result if this issue is not resolved prior to trial, the trial judge should make prompt inquiry into this matter by holding a hearing without delay upon remand.

The importance of avoiding problems by conscientious and thorough pre-trial proceedings by the trial judge is reflected in the recent amendments to Fed. R. Civ. P. 16, effective August 1, 1983. Rule 16 now provides for greater judicial management of cases prior to the start of trial in order to see that the case is "disposed of . . . more efficiently and with less cost and delay. . . ." Advisory Committee Note to 1983 Amendment. The rule specifically calls for the *trial* court judge, in the exercise of his or her discretion, to hold a pre-trial conference where many subjects may be discussed, including "such other matters as may aid in the disposition of the action." Fed. R. Civ. P. 16(c)(11). The

importance of pre-trial procedures is also evidenced by the words of Judge Laws, the late Chief Judge of the United States District Court for the District of Columbia:

> One of the vital, if not outstanding, advantages of pretrial procedure is to take the trial cases out of the realm of surprise and maneuvering, whereby an unwary counsel might see the just case of his client lost.

Laws, *Pre-Trial Procedure,* 1 F.R.D. 397, 399 (1940).

In the case before the Court today, if the trial judge were not to make prompt and efficient inquiry on remand, the potential for unfair surprise is great. In addition, if unresolved problems arise at trial for the first time, the potential for incurable prejudice, resulting in a mistrial, is quite high. Absent comprehensive pretrial procedures, trial judges may be forced to hold complex hearings on issues unrelated to the merits of an action *in the middle of trial.* It would indeed be unfortunate [5] if the trial judge in this case on remand, were forced to hold a hearing on this crucial ethical question and voir dire the witnesses and lawyers in the middle of trial. Such action would result in undue delay of the trial, added expense to the witnesses, counsel and the parties, and added uncomfort and anxiety to a jury panel that will have to sit and wait while these issues are ironed out. This result would be inconsistent with the duty of the trial court to conduct the trial in the most economical and efficient manner. *See* Fed. R. Civ. P. 1, 16.

The first question the trial judge must resolve is whether counsel intend to call their legal adversaries as witnesses or whether the lawyers should testify on their respective clients'

behalf. If counsel represent that such situations will not occur, that may end the matter. If counsel represent, however, that the potential does exist, the trial judge should immediately convene a hearing to address the issues and make appropriate findings with respect to this matter. Judge Wald seems to suggest that ethical violations, and perhaps other matters should be dealt with by "admonitions, protective orders, or even, if necessary, by post-trial contempt orders without needlessly delaying proceedings on the merits." Such advice in this instance, however, appears to ignore the obvious practical problems that a trial judge faces when trying a case. The question remains "how does a judge try a case most effectively and fairly to all parties involved?". The answer lies in thorough and comprehensive pre-trial procedures that resolve in advance, all of the problems that may be reasonably anticipated or expected to arise at the trial. This is the purpose of Motions in Limine and Fed. R. Civ. P. 16. By promptly resolving such problems, the trial court will be securing the highest quality of justice, in the least amout of time, and at the lowest possible cost to the parties. [6]

Even the Suggestion of Remanding This Case to Another Judge Is Inappropriate

My second concern with Judge Wald's opinion stems from the implicit allegations made against the trial judge in this case concerning her alleged "one-sided approach" to the case. After a thorough review of the record, I can conclude no more than that she has erred in disqualifying Allis and Butler on the grounds set forth in the majority opinion. I cannot join in such direct or indirect criticism of the competence and fairness of the trial judge. I concur, wholeheartedly, however, with this panel's de-

cision not to directly remand the case to another judge and desire to express my views more fully because of the potential for havoc such a remand policy would generate upon the effective administration of justice in the trial court.

While appellate courts do have authority to reassign cases on remand "to avoid even the appearance of bias," *see Calvaresi* v. *United States*, 348 U.S. 961 (1955); *Lewis* v. *Curtis*, 671 F.2d 779, 789 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 176 (1982), "such mandatory reassignments should be made infrequently and with the greatest reluctance." *Nobel* v. *Morchesky*, 697 F.2d 97, 103 n. 11 (3d Cir. 1982). "Remand to a different judge is not the usual remedy when error is found in District Court proceedings. Remand to a new judge is reserved for unusual circumstances." *United States* v. *Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979); *see also United States* v. *Medina-Cervantes*, 690 F.2d 715, 717 (9th Cir. 1982). Without specific and objective evidence that a trial judge, acting in his or her judicial capacity, will be unable to fairly follow the mandates of this Court and apply them in a fair and impartial manner, a remand to another judge, or a direct or indirect suggestion for such action is totally inappropriate in my view. Some courts have declined to remand cases to another judge on the implicit rationale that judges are presumed to be able to act [7] fairly. *See e.g., Spivey* v. *Zant*, 683 F.2d 881, 886 (5th Cir. 1982) ("We are confident that the District Judge . . . is capable of according Spivey the fair hearing to which he is entitled."); *Zweibon* v. *Mitchell*, 606 F.2d 1172, 1182 n. 57 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981), *rehearing denied*, 453 U.S. 928 (1981). Cer-

tainly, based upon the record, such is the case here. To hold otherwise is to engage in sheer speculation, conjecture and surmise which would be improper.

In *Zweibon* v. *Mitchell*, 606 F.2d at 1182 n. 57, this Court recognized that a trial judge should be deemed capable of carrying out his or her judicial obligations:

> We decline appellant's invitation to assign this case to a different judge on remand. We are confident that the District Judge will follow this court's rulings and will faithfully discharge his judicial obligations.

Even when this Court has found that a trial judge was "disposed against" a party's claim, it declined to mandate reassignment to another judge. The Court left that decision to the discretion of the District Court under its rules, and the presumption that the trial judge would recuse himself if grounds for such an action existed. *See United States* v. *Barnes*, 662 F.2d 777, 783 (D.C. Cir. 1980).

The situations in which reassignment has been mandated by this Court are very distinguishable from the case at bar. In *Naples* v. *United States*, 307 F.2d 618 (D.C. Cir. 1962) (en banc), a case was remanded to a different judge when there existed an "unmistakable" conclusion that the trial judge's opinion largely reflected the "personal views of the author", the judge had not cited the relevant precedent in the Circuit, and when the judge re-appointed counsel for a defendant when the lawyer refused to pursue a procedural course of action suggested by the judge. *Id.* at 629-30. Even in that case, [8]

however, three judges wrote separately to disagree with the decision to remand the case to a different judge. The late Circuit Judge Bastian wrote:

> Our principal purpose here is to dissociate ourselves from the ruling of the majority that, upon remand, the case must be tried before a different judge. We consider this a reflection on a distinguished member of the District Court whose ability and integrity are well known. We think a reading of the judge's opinion indicates the meticulous care and attention which he gave to this case. There is no reason to believe that the District Judge would not follow the rules laid down by this court in its majority opinion.

Id. at 631-32. In *Bishop* v. *United States*, 349 F.2d 220 (D.C. Cir. 1965), *cert. denied*, 393 U.S. 870 (1968), a remand to another judge was found to be appropriate when the trial judge had shown "such disregard" for procedures designed to test the validity of a criminal plea, that an "impartial inquiry" was needed. *Id.* at 221.

In the case before the Court today, I can find no actions by the trial court judge that rise to such a level justifying a remand to another judge. Her opinion and comments during hearings represent fair comment on the evidence introduced before her in open court which the standardized jury instructions for the District Court assert is appropriate and proper. *See* Standardized Civil Jury Instruction for the District of Columbia, No. 1-6 (1981). Counsel for appellants in this case seek to "end-run" the tough standards for recusal of judges mandated by Congress in 28 U.S.C. §§ 144 and 455. Such statutes are consistently construed strictly to safeguard the judi-

ciary from frivolous and unwarranted attacks upon its dignity and integrity, to prevent abuse and to insure the orderly functioning of the judicial system. *See e.g., Rademacher* v. *City of Phoenix*, 442 F. Supp. 27, 29 (D. Ariz. 1977); *Town of East Haven* v. *Eastern Airlines, Inc.*, 304 F. Supp. 1223 (D. Conn. 1969). In addition, the [9] law is clear that bias and prejudice acquired by the Court *in its judicial capacity*, or indicated by in-court comments prompted by developments in the case or prior legal proceedings, cannot be the basis for recusal. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *In re International Business Machines Corp.*, 618 F.2d 923, 929 (2d Cir. 1980) (Bias must be extrajudicial and not based upon in-court rulings.); *United States* v. *Haldeman*, 559 F.2d 31, 133 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 955 (1977); *United States* v. *Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Wolfson* v. *Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968). Counsel for appellants have not shown any facts raising a colorable claim that the trial judge should have recused herself and did not raise this issue on appeal. There is simply no evidence that the experienced trial judge in this case will be unable to continue to preside over the trial, on remand, with her usual competence, impartiality and good judgment based upon her outstanding record of thirteen years of trial judge experience and her experience in the Corporation Counsel's Office and the Department of Justice. Based upon long experience as a litigator and as a trial judge, I cannot sanction the use of requests to remand appellate cases to different judges. The time has come to implement the mandate of Congress and remand cases to a different trial judge *only* on the basis of evi-

dence that would require recusal under 28 U.S.C. §§ 144 and 455. Otherwise, we will be opening a "Pandora's Box" for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic.

To encourage requests for remands to another judge, would also be encouraging indirect judge shopping, and libelous or slanderous statements directed against *both* trial and appellate judges. In addition, remands by an appellate court to different judges cause a waste of valuable judicial resources particularly in a case such as this [10] where the trial judge has become familiar with the facts and issues of a case. This factor has been considered by a number of courts and is particularly relevant when the case is a complex one. *See United States* v. *Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc); *United States* v. *Medina-Cervantes*, 690 F.2d 715, 717 (9th Cir. 1982). Such a remand by an appellate court is also an unnecessary disparagement of the trial judge's reputation at the bar and may even contribute to the loss of collegiality and her effectiveness. For these reasons, I agree with my colleagues' decision not to accept appellant's suggestion to remand to another judge but would omit any implicit suggestion of the possibility of recusal. Such suggestions will only encourage requests for a remand to a different judge on frivolous grounds in the future. The Court's function is to discourage such a practice except in the most egregious case.

Amendments to the Opinion of the Court of Appeals Dated July 16, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-01258

Filed Jul 16 1984

GEORGE A. FISHER
Clerk

No. 84-5039

Anne Elisabeth Koller, et al.
James G. Butler, et al.,

Appellants

v.

Richardson-Merrell, Inc., A Delaware Corporation

BEFORE:

WALD and MIKVA, Circuit Judges, and RICHEY*, District Judge, United States District Court for the District of Columbia

ORDER

It is ORDERED by the Court, *sua sponte*, that the Opinion of the Court filed on May 29, 1984, is amended as follows:

Page 50, after line 8, add the following sentence:

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

Amendments to the Opinion of the Court of Appeals

> We need not decide, however, if Canon 20 requires such a showing in all cases or for all disciplinary purposes,[67] for we have already determined that disqualification is appropriate in cases of this kind only if the misconduct at issue is "likely to infect future proceedings." *See supra* p. 35.

Add new footnote 67:

> Nor, of couse, do we purport to determine the manner in which the local Legal Ethics Committee should interpret the phrase "substantial threat to the due administration of justice."

All subsequent footnotes (67-70) should thus be renumbered.

Page 51, ¶ 2, lines 3-7: delete

> "he could properly be found . . . to a fair trial for defendants"

and insert in its place

> "This record could support a finding that his conduct was likely to infect future proceedings. Under these circumstances,"

Per Curiam
For the Court:

GEORGE A. FISHER, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Opinion of the District Court
Dated January 6, 1984

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 80-1258

FILED
JAN 6 1984
Clerk, U.S. District Court
District of Columbia

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on the motion of defendant to impose sanctions on plaintiffs' counsel for certain alleged misconduct. The major incidents under consideration are 1) Nicholas Allis' preparation and procurement of a statement from Krystyna Janowski retracting her previous statement to defendant that this case is fraudulent and 2) James Butler's release of fourteen drug experience reports (DERs) and other information regarding defendant's manufacture of the drugs Thalidomide, MER-29, and Bendectin to the *Washington Post* (Post) and other representatives of the media.* On February 27, 1983, the Court

* Defendant alleges several other incidents of alleged misconduct by plaintiffs' counsel, however, the Court need not reach these issues.

Opinion of the District Court

heard oral argument on this matter, and an evidentiary hearing was held in March. Thereafter, the Court ordered plaintiffs' counsel to show cause why James Butler, Nicholas Allis, and the firm of Butler, Jefferson, Dan & Allis (Butler firm) should not be disqualified from further representation of plaintiffs. Pursuant to that Order, further hearings were held. After careful consideration of the entire record herein, and for the reasons more fully set forth below, the Court will grant the motion of defendant to impose sanctions on counsel for plaintiffs.

Factual Background

The facts giving rise to defendant's motion to impose sanctions are not simple. In May of 1980, plaintiffs filed suit against defendant alleging that the birth defects suffered by their second child, Anne Koller, were caused by the drug Bendectin that Cynthia Koller allegedly ingested during the first trimester of her pregnancy. On December 22, 1982, Ms. Janowski, secretary to Mr. Allis, telephoned counsel for defendant on two occasions and stated that the Butler firm was committing a fraud on the Court as counsel knew that Cynthia Koller had not taken Bendectin during the first trimester of her pregnancy—the critical period. Counsel for defendant informally advised the Court of this development and later formally advised the Court of the events after confirming the identity of Ms. Janowski and arranging for independent counsel to advise her.

On December 27, 1982, Allis, after conferring with Butler and other members of the firm, met with Janowski at the California Hospital where she was visiting her hospitalized premature infant. The purpose of Allis' visit was to determine what, if anything, Janowski had related to counsel for defendant. Following this visit, Allis conferred with Floyd

T. Humphries, Jr., an investigator regularly retained by the Butler firm, to discuss the contacts between Janowski and defendant. Allis made the decision to visit Janowski at her home that evening and not only requested Humphries to accompany him but also requested him to surreptitiously record the conversation. Allis also prepared a typed statement retracting the statements made by Janowski to counsel for defendant with the express purpose of presenting it to Janowski for her signature. During the visit at Janowski's apartment, Humphries recorded portions of the conversation and Janowski signed the statement prepared by Allis under "penalty of perjury." However, on January 3, 1983, Janowski, through counsel, disavowed the truthfulness of the prepared statement and charged that it was obtained under duress and on an offer to continue payment of her salary and fringe benefits, including hospitalization for her premature infant, by the Butler firm.

The facts surrounding the second incident of alleged misconduct relate to the release of certain information to the media. On January 17, 1983, the Court issued an Order excluding the DERs of Marco Cordova and Pauline Sand from evidence in this case as unreliable and highly prejudicial to defendant. In a separate Order, dated January 24, 1983, evidence from all DERs filed more than one year after the birth of a child were excluded from evidence. Six days later, James Butler released fourteen DERs to the media. Among the fourteen were those related to Anne Koller, Marco Cordova, Pauline Sand, and others originally filed more than one year after the birth of the child.

DISCUSSION

It is well settled that an attorney's admission pro hac vice in a case is the granting of a privilege and not a right. *See*

In Re Belli, 371 F. Supp. 111, 112 (D.D.C. 1974) citing *Thomas* v. *Cassidy*, 249 F.2d 91 (4th Cir. 1957), *cert. denied, Fitzgerald* v. *Cassidy*, 355 U.S. 958 (1958). Thus, the revocation of pro hac vice admission, unlike the revocation of a license to practice law in a disciplinary proceeding, is in the sound discretion of the court. *In Re Belli*, 371 Supp. at 112. Accordingly, conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the denial or revocation of an attorney's pro hac vice appearance. *See Id.; Thomas* v. *Cassidy*, 249 F.2d 91 (4th Cir. 1957). This is not to say, however, that an attorney with pro hac vice status should not be afforded notice and an opportunity to respond in certain circumstances when a court seeks to revoke the privileged admission. *See Johnson* v. *Trueblood*, 629 F.2d 302, 303 (3rd Cir. 1980).

While there is no strict test for determining whether a nonresident attorney's pro hac vice appearance in a case should be revoked during the course of a trial, a general test is whether the conduct of the attorney was so impermissible as to warrant the revocation of his admission pro hac vice. *Cf. In Re Belli*, 371 F. Supp. at 112. When exercising its discretion the court must be mindful of the fact that any decision to revoke an attorney's pro hac vice status may have repercussions in the attorney's "home" state and may adversely affect the client's case. *See Johnson*, 629 F.2d at 304. A court, however, must also weigh and give serious consideration to the importance of maintaining the integrity of both the court and the judicial process.

The first occurrence of alleged misconduct under the Court's consideration is Allis' preparation and procurement of a statement of retraction by Ms. Janowski. Plaintiffs assert that his preparation and procurement of the retrac-

tion was an attempt by Allis to fulfill his obligation under the Code of Professional Responsibility (Code) to zealously represent the interest of his clients and not an attempt to mislead this Court. Expert witnesses called by Allis testified that his conduct was justified and consistent with the Code. However, the opinions of the expert witnesses are unconvincing and not accepted by the Court as the totality of the evidence, including the circumstances surrounding the preparation and procurement of the retraction from Janowski, proves the unjustifiability of Allis' conduct in presenting the retraction to the Court without explanation. There is no doubt that Allis, under the broad provisions of Canon 7 and Canon 2 of the Code, has the duty and ethical obligation to not only zealously pursue the interest of his clients but also to investigate whether Cynthia Koller was committing a fraud upon the court thereby making the suit worthless and a waste of judicial resources. *See* DR 7-102(A)(3), 7-102(A)(6); DR 2-110(B)(1). Allis was not merely conducting an investigation in the interest of his clients and in fulfillment of his obligations to the Court as the credible and probative evidence in the record reveals that the primary, if not the only reason, Allis and Humphries visited Janowski on December 27, 1983, was to obtain a retraction. Assuming *arguendo* that securing a statement of retraction was not the sole reason for Allis' visit, the evidence shows that procuring the retraction was clearly a controlling factor in his decision to meet with Janowski. Moreover, the impropriety of Allis' conduct is evident by 1) Allis' collaboration with Humphries to surreptitiously record a portion of his conversation with Janowski; 2) Allis' testimony under oath that he had no intention of informing the Court of the findings of his "investigation"; 3) Allis' failure to read the prepared statement line-by-line to Janowski to ensure that she understood the contents of the statement before signing; and 4) Allis' procurement of the statement irrespective of the erratic behavior displayed by Janowski during his visit on December 27. At best, Allis' conduct can be characterized as an attempt to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients. Clearly, this is not the nature of an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court. *See* DR 7-102(B)(1).

The Court will now turn to James Butler's release of fourteen DERs to the Post on January 28, 1983. As previously indicated, thirteen of the fourteen DERs released by Butler were excluded from evidence by previous Orders of this Court by its findings that they were highly prejudical to defendant. Plaintiffs contend that any sanctions imposed by this Court for Butler's release of this information would constitute a serious abridgement of his first amendment rights. Although it is a cardinal principle of constitutional law that lawyers do not "surrender their First Amendment rights at the Courthouse door", it is also well established that attorneys, as officers of the court with many privileges and responsibilities, are subject to judicial sanctions. *In Re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1977). One such responsibility is to refrain from any conduct which will obstruct the administration of justice, such as the circumvention of a court's ruling on the admissibility of evidence. Butler's knowing release to the Post of information previously ruled inadmissible by this Court was a flagrant circumvention of the Orders of this Court as Mintz's article appeared in the Post in February 1983 after the jury panel had been drawn for that month and after the Court and the

parties were preparing for trial. In addition, Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress the Court's conclusion that his release of the DERs to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings.

Plaintiffs maintain, however, that revocation of the pro hac vice admission of plaintiffs' counsel would be fatal to plaintiffs' case. This Court is not convinced that this would be the result if the Butler firm is disqualified from further representation of plaintiffs in this case. Plaintiffs initially retained the law firm of Eaton and Associates, Washington, D.C., and Cohen and Kokus of Miami, Florida. Clearly, remaining counsel can provide plaintiffs with competent counsel. For example, the Eaton firm represented the plaintiffs in the *Mekdeci* case—a Bendectin case. Plaintiffs' case would not be jeopardized by the disqualification of the Butler firm. In addition, the possible effects the disqualification of the Butler firm may have in California, the home state of plaintiffs' counsel, do not outweigh the strong public interest in maintaining the integrity of the judicial process. In short, the course of conduct of plaintiffs' counsel as a whole was so impermissible as to warrant this Court's exercise of its discretion to revoke the pro hac vice appearance of Nicholas Allis and James Butler thereby disqualifying the Butler firm from further representation of plaintiffs in this case. Accordingly, the motion of defendant to impose sanctions is granted. An Order consistent with this Opinion will be entered on this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Date: January 6, 1984

Order of the District Court
Dated January 6, 1984

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 80-1258

FILED
JAN 6 1984
Clerk, U.S. District Court
District of Columbia

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

ORDER

Upon consideration of the motion of defendant to impose sanctions on counsel for plaintiffs, the Order of the Court requiring James G. Butler, Esq., and Nicholas R. Allis, Esq. to show cause why they and their firm should not be disqualified, the opposition, the evidence, the argument of counsel, the entire record herein, and consistent with the Memorandum Opinion of even date, it is this 6th day of January, 1984.

ORDERED that the motion of defendant be and hereby is granted in part; and it is further

Order of the District Court

ORDERED that the *pro hac vice* appearance of James G. Butler, Esq., as counsel for plaintiffs herein be, and hereby is, revoked; and it is further

ORDERED that the *pro hac vice* appearance of Nicholas R. Allis, Esq., as counsel for plaintiffs be, and hereby is, revoked; and it is further

ORDERED that the appearance of the firm, Butler, Jefferson, Dan and Allis be, and hereby is, revoked.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Notice of the Court of Appeals
Entry of Judgment Dated May 29, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON, D.C. 20001

GEORGE A. FISHER
CLERK

May 29, 1984

RE: No. 84-5039—Anne Elisabeth Koller, an infant, by and through John Lamont Koller and Cynthia Anne Koller, her natural guardians, et al.; James G. Butler, Nicholas R. Allis and the law firm of Butler, Jefferson, Dan and Allis v. Richardson-Merrell, Inc., a Delware Corporation

Dear Counsel:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

/s/ DENISE C. THOMAS
Denise C. Thomas
Opinions Clerk

Order of the Court of Appeals
Denying Petition for Rehearing
Dated July 17, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-01258

Filed Jul 17 1984

GEORGE A. FISHER
Clerk

No. 84-5039

Anne Elisabeth Koller, et al.,
James G. Butler, et al.,
Appellants

v.

Richardson-Merrell, Inc., A Delaware Corporation

BEFORE:

WALD and MIKVA, Circuit Judges, and RICHEY*, District Judge, United States District Court for the District of Columbia

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

Order of the Court of Appeals
Denying Rehearing

ORDER

On consideration of the Petition for Rehearing of Appellees filed June 28, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Order of the Court of Appeals
Denying Petition for Rehearing *En Banc*
Dated July 17, 1984

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-01258

Filed Jul 17 1984

GEORGE A. FISHER
Clerk

No. 84-5039

Anne Elisabeth Koller, et al.,
James G. Butler, et al.,

Appellants

v.

Richardson-Merrell, Inc., A Delaware Corporation

BEFORE:

ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, CINSBURG, BORK, SCALIA and STARR, Circuit Judges, RICHEY*, District Judge, United States District Court for the District of Columbia

* Sitting by Designation pursuant to Title 28 U.S.C. § 292(a).

Order of the Court of Appeals
Denying Rehearing En Banc

ORDER

The Suggestion for Rehearing *en banc* of Appellees has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Wilkey did not participate in this order.

Statute and Rules Involved

UNITED STATES CODE

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the fact specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient

if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Rule 1-4. Appearance and Withdrawal of Attorneys.

(a) *Who May Practice.*

(1) An attorney who is a member in good standing of the bar of this court may enter an appearance, file pleadings and practice in this court if he either (i) maintains an office for the practice of law within the District of Columbia, or (ii) maintains an office in a contiguous area in whose courts a member of the bar of this court who is also a member of the bar of the highest court of the State in which the contiguous area is located is permitted to appear, file pleadings and practice without being required to join of record an attorney having an office in the contiguous area.

(2) An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any State but who does not qualify under the requirements of subsection (1) above may enter an appearance, and file pleadings in this court, provided that such attorney joins of record a member of the bar of this court who does meet the requirements of subsection (1) and who will at all times be prepared to go forward with the case. All

pleadings submitted by out-of-town counsel must also be signed by an attorney who meets the requirements of subsection (1). If such an attorney wishes to be heard in open court, he must in addition secure the permission of the trial judge.

(3) An attorney who meets the requirements of subsection (1) above at the time of the entry of his appearance, but who thereafter removes his office to a location outside the District of Columbia and outside a qualifying contiguous area, shall at the time of such removal join of record in all cases pending in this Court in which his appearance is entered an attorney who meets the requirements of subsection (1).

(4) An attorney who is employed or retained by the United States or one of its agencies may enter an appearance, file pleadings and practice in this court in cases in which the United States or the agency is a party, irrespective of (1)-(3) above.

(5) A State Attorney General or his designee, who is a member in good standing of the bar of the highest court in any State or of any United States Court, may appear and represent the State or any agency thereof, irrespective of (1)-(3) above.

(6) Notwithstanding the provisions of clauses (1) through (3) above, an attorney who is a member in good standing of the District of Columbia Bar may enter an appearance in any case handled without a fee upon filing a certificate with the Court that he is providing representation without compensation, at the same time providing his mailing address and telephone number.

(b) *Entry of Appearance.*

(1) An attorney eligible to appear may enter an appearance in a civil case by signing any pleading or other paper described in Rule 5(a), Federal Rules of Civil Procedure, filed by or on behalf of the party the attorney represents, or by filing a written *praecipe* noting the entry of his appearance and listing his correct address and telephone number.

(2) The Clerk shall not accept any paper signed by an attorney for filing unless the attorney is eligible to appear and has entered his appearance as provided herein.

(c) *Withdrawal of Appearance.*

(1) If a trial date has not been set, an attorney may withdraw his appearance in a civil action by filing a *praecipe*, signed by the attorney and his client, noting such withdrawal, provided that another attorney enters or has entered an appearance on behalf of the client at that time.

(2) If a trial date has been set or if the client's written consent is not obtained, or if the client is not represented by another attorney, an attorney may withdraw his appearance only by order of the court upon motion by the attorney served upon all parties to the case or their attorneys. Unless the client is represented by another attorney or the motion is made in open court in the client's presence, a motion to withdraw an appearance shall be accompanied by a certificate of the moving attorney listing the client's last known address and stating that the attorney has served upon his client a copy of the motion and a notice advising the client to obtain other counsel, or, if he intends to conduct his

case in proper person or to object to the withdrawal, to so notify the Clerk in writing within five days of service of the motion upon him.

(3) The court may deny an attorney's motion for leave to withdraw if his withdrawal would unduly delay trial of the case, be unduly prejudicial to any party, or otherwise not be in the interests of justice. The Clerk shall mail to the affected client a copy of the order granting or denying a motion for leave to withdraw.

Rule 4-3(IV). Standards for Professional Conduct.

(a) For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this court may be disbarred, suspended from practice before this court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

(b) Acts or omissions by an attorney admitted to practice before this court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the District of Columbia Court of Appeals, as amended from time to time by that court, except as otherwise provided by specific Rule of this court, after consideration of comments by representatives of bar associations within this district.

Rule 4-3(VIII). Attorneys Specially Admitted.

Whenever an attorney applies to be admitted or is admitted to this court for purposes of a particular proceeding (*pro hac vice*), the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course of, in the preparation for, or in connection with such proceeding.

DISTRICT OF COLUMBIA
CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

DR 2-110. Withdrawal from Employment.

. . . .

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw

from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise havings steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

. . . .

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

. . . .

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, other than DR 2-110 (B)(3) or (B)(4) or DR 6-101(A)(1), or, in appropriate cases, DR 5-101(A), no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment, provided that any imputed disqualification or restrictions that attach because a lawyer was a public employee shall be determined under Canon 9.

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to

rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-106. Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107. Trial Publicity.

. . . .

(H) The following text is that of Canon 20 of the Canons of Professional Ethics:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be

condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.*

(1) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

DR 7-108. Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

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* By order of February 14, 1975, the District of Columbia Court of Appeals deleted DR 7-107(G) and (H). In lieu of these provisions, the Court retained Canon 20 of the Canons of Professional Ethics.

(2) A lawyer who is not connected therewith shall not communicate with a juror concerning the case.

. . . .

CALIFORNIA PENAL CODE

§ 632. Eavesdropping on or recording confidential communications.

(a) *Prohibited acts; punishment; recidivists.* Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both such fine and imprisonment in the county jail or in the state prison.

(b) *Person.* The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual

known by all parties to a confidential communication to be overhearing or recording such communication.

(c) *Confidential communication.* The term "confidential communication" includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) *Evidence.* Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) *Exceptions.* This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) *Hearing aids.* This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

§ 633.5. Recording communications relating to commission of extortion, kidnapping, bribery, felony involving violence against the person, or violation of § 653m

Nothing in Section 631 or 632 shall be construed as prohibiting one party to a confidential communication from recording such communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to such communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m, and nothing in Section 631 or 632 shall be construed as rendering inadmissible in a prosecution for extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m, or any crime in connection therewith, any evidence so obtained.